

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

4 JOHN DOE 1 et al.,) CIVIL ACTION
5 Plaintiffs,) NO. PJM-21-356
6 v.)
7 MONTGOMERY COUNTY BOARD OF)
EDUCATION et al.,)
8 Defendants.)

TRANSCRIPT OF MOTIONS HEARING PROCEEDINGS
BEFORE THE HONORABLE PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE
THURSDAY, APRIL 27, 2023; 11:01 A.M.
GREENBELT, MARYLAND

APPEARANCES:

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25 *** COMPUTER-AIDED TRANSCRIPTION OF STENOTYPE NOTES ***

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1 (Call to order of the Court.)

2 THE COURT: Good morning, folks. Have a seat,
3 please.

4 THE DEPUTY CLERK: The matter now pending before the
5 Court is Civil Action No. PJM-21-356, Doe 1 et al. v.
6 Montgomery County Board of Education et al. The matter now
7 comes before the Court for a motions hearing.

8 THE COURT: All right. Let's identify counsel first,
9 and let's start with plaintiffs' counsel. We have different
10 counsel I think -- well, depending on who argues. Who is going
11 to speak first?

12 MR. MALONEY: Good morning, Your Honor. Timothy
13 Maloney on behalf of the John Doe Plaintiffs, and we did
14 submit, at 10:00, a revised speaking schedule for all parties.

15 THE COURT: All right. I have that.

16 Anyone else to identify for plaintiffs' counsel?

17 MR. RUFF: Yes, Your Honor. Good morning, Your
18 Honor. Malcolm Ruff, R-U-F- "F," as in "Frank," on behalf of
19 John Doe Plaintiffs 1 and 2.

20 MR. DeGONIA: And good morning, Your Honor. Tom
21 DeGonia and Jerry Hyatt on behalf of John Doe No. 3. I will be
22 doing the arguing for our party today.

23 THE COURT: Any other plaintiffs' counsel to be
24 identified? Are some in the gallery?

25 MR. MALONEY: Yes, Your Honor. In the gallery, we

1 have Alyse Prawde and Matthew M. Bryant, who are also my
2 co-counsel for the John Doe No. 4 Plaintiffs.

3 MR. DeGONIA: And co-counsel for John Doe No. 3, Your
4 Honor, Jerry Hyatt as well.

5 MR. RUFF: And Your Honor, Mr. Murphy sends his
6 regards.

7 THE COURT: For defendants, starting with the Board
8 of Education and others?

9 MS. KANE: Good morning, Your Honor. Patty Kane on
10 behalf of the Board of Education, Jeffrey Sullivan, Eric
11 Wallich, Casey Crouse, and Vinny Colbert. With me at counsel
12 table is my colleague, Jacquelyn Allen. And we also have
13 Counsel Margaret Turlington in the courtroom who is in the
14 gallery --

15 THE COURT: All right.

16 MS. KANE: -- on behalf of the same defendants.

17 Would you like me to identify my clients here as well, or
18 not at this time?

19 THE COURT: Well, who are they, the parties?

20 MS. KANE: Yes. We have representatives here from
21 Montgomery County Public Schools, the Board of Education.

22 THE COURT: Any other defendants?

23 MR. KARPINSKI: Your Honor, good morning. Kevin
24 Karpinski on behalf of Defendant Joseph Doody.

25 THE COURT: Right. Ms. Kane, did you say you wanted

1 to identify any of the parties that were here?

2 MS. KANE: Yes. I didn't know if you wanted that.

3 THE COURT: Well, you can. I didn't ask -- well, I
4 don't know who is here on plaintiffs' side. I assume all Doe
5 Plaintiffs are here?

6 MR. MALONEY: The John Doe parents of John Doe No. 4
7 are here present in the gallery.

8 THE COURT: No other John Doe Plaintiffs are here?

9 MR. RUFF: They are, Your Honor. John Doe Plaintiff
10 No. 2 is here, along with his mother. John Doe Plaintiff No. 1
11 is not here, but his parents are here with us.

12 THE COURT: All right.

13 MR. DeGONIA: And John Doe Plaintiff No. 3 is
14 present, Your Honor.

15 THE COURT: All right. And then to go back to you,
16 Ms. Kane -- thank you -- did you want to identify the
17 individuals who are here who are your clients?

18 MS. KANE: Yes. I have Stephanie Williams, who is
19 general counsel for Montgomery County Public Schools, and Jody
20 Malmstrom, who is the legal director for Montgomery County
21 Public Schools.

22 THE COURT: Is that it?

23 MS. KANE: Yes, Your Honor.

24 THE COURT: Okay. Good. All right. Thank you.
25 Have a seat, if you would.

1 There are a couple of preliminary matters I need to clear
2 up. First of all, I have a David Felsen on the docket yet. I
3 don't know who David Felson is as a party, not just counsel.
4 Why is he -- is he in the case?

5 MR. DeGONIA: I'm sorry, Your Honor. Tom DeGonia.
6 Your Honor, my understanding is he represented one of the
7 juvenile original plaintiffs -- or defendants in the criminal
8 matter, and there were motions back and forth about subpoenaing
9 and compelling the testimony of that witness, so he represented
10 a witness in this matter.

11 THE COURT: He is not a party?

12 MR. DeGONIA: That's correct.

13 THE COURT: Fair enough. Let's be clear, because
14 he's carried, I think, as a party in the case, and I want to be
15 clear.

16 MR. DeGONIA: Yes, Your Honor.

17 THE COURT: Now, with regard to the issue of the
18 parents of adult plaintiffs being separate plaintiffs in the
19 case, I thought I addressed that earlier in my opinion, that
20 their claims for medical expenses, insofar as the different
21 causes of action allow, can be recovered by the individual
22 plaintiffs, so we don't need them as separate plaintiffs in the
23 case. The Doe Plaintiffs are in the case. They don't need to
24 be represented by parents unless they are minors, and I assume
25 now they are all adults. Is that correct?

1 MR. MALONEY: They are, Your Honor. Our nervousness
2 on that is this: There is some Maryland appellate court
3 decisions that we have cited that says that pre-majority
4 economic claims belong to parents and the post majority belong
5 --

6 THE COURT: Oh, the claims as opposed to who the
7 parties should be?

8 MR. MALONEY: Correct. And there is an issue of
9 standing otherwise. I mean, if there is a stipulation with the
10 defendants that they can do it, perhaps, but we are very
11 concerned about the standing.

12 THE COURT: I was not aware of that decision.

13 Ms. Kane, what's your thought?

14 MS. KANE: The thought is we would agree that the
15 plaintiffs who have now -- the former minor plaintiffs who have
16 now attained their majority can make the claim for pre-majority
17 medical expenses to the extent they are relevant and
18 admissible.

19 THE COURT: In that case, then we don't need the
20 adult plaintiffs.

21 MR. MALONEY: I suspect we don't. What I would ask,
22 because I don't think it's important for today's purposes, is
23 that we be able to talk to our clients just to make sure we are
24 fine on that, but I want to make sure we don't step into the
25 standing issue in view of the appellate decision.

1 THE COURT: Well, we have got the stipulation for
2 Ms. Kane speaking for the County. I -- I think what I'd like
3 to do, and we need to do this pretty quickly if we don't do it
4 today, clear the record out about who the plaintiffs are in a
5 matter of a few days. Let us know by letter so we can clean
6 that up.

7 MR. MALONEY: We can do that by early next week, Your
8 Honor. Thank you.

9 THE COURT: And then the further issue is I did
10 require about using initials of not just parties but
11 individuals who are associated with the case in one way or
12 another, and the Court will continue to use initials here with
13 regard to any parties that are concerned about it, so I don't
14 think we need to spend more time on that.

15 Okay. Well, that said, I think those are my preliminary
16 matters. Unless somebody has something, we are ready to jump
17 right into this, are we not? We have a schedule from you. We
18 are going to try to stay fairly close to it so we can hear from
19 everyone.

20 So the first item up is Count One, negligence, and I have
21 Ms. Kane, you speaking first for 30 minutes.

22 MS. KANE: Thank you, Your Honor. Did you want
23 counsel to argue from the podium?

24 THE COURT: Your convenience. Whatever works for you
25 is good.

1 MS. KANE: If it pleases the Court, I will stay here
2 in the event I need to grab something out of my box.

3 THE COURT: Very good.

4 MS. KANE: Thank you.

5 THE COURT: Go ahead.

6 MS. KANE: Thank you, Your Honor. May it please the
7 Court.

8 As the Court is aware, this suit involves four
9 plaintiffs' and six defendants' various theories of alleged
10 legal liability, which are identified in the joint chart that
11 the parties previously submitted at the Court's request. The
12 Court has ordered the hearing today to proceed by count, and
13 the parties have prepared a -- an agenda based on the Court
14 order, which the Court has just referenced.

15 In compliance with that Court order, this hearing begins
16 with Count One, negligence, which was filed by all plaintiffs
17 against all defendants. While all four plaintiffs have filed
18 negligence claims against all of the defendants, the negligence
19 count arises out of two separate and distinct incidents. One
20 involved Doe 1 and occurred first in time on August 1, 2017.
21 It is described in the Plaintiffs' Joint Second Amended
22 Complaint at paragraphs 56 to 63.

23 It's important for purposes of this hearing to understand
24 that the defendants have filed a separate motion for summary
25 judgment on all counts as to Doe 1 because of the difference in

1 the events which are the basis of his claims.

2 So the motion I will be arguing at this time, Your Honor,
3 is on behalf of the Board of Education, Sullivan, Crouse,
4 Wallich, and Colbert with respect to Doe 1's negligence claim
5 against them.

6 Mr. Doody also has a claim against Doe 1 on his
7 negligence claim against Mr. Doody, and that would be argued by
8 Mr. Karpinski. Mr. Karpinski's prior motion for summary
9 judgment on the negligence claims of 2, 3, and 4, which does
10 appear in the Court's chart, was withdrawn. I understand the
11 Court was notified, but I didn't want there to be any confusion
12 and wanted to make sure that was clear before we began
13 argument.

14 THE COURT: Okay.

15 MS. KANE: So what's relevant for purposes of this
16 argument is the facts and circumstances as they existed at or
17 before the time of Doe 1's criminal assault, and applying the
18 framework -- applying the facts and the law to this framework,
19 there is no material dispute of fact, and the defendants are
20 entitled to judgment as a matter of law.

21 Doe 1's suit arises out of an incident in which he was
22 criminally assaulted by his football teammates in the Damascus
23 High School locker room during the preseason on or about August
24 1, 2017. He did not sue his teammate perpetrators for this
25 unexpected or unforeseeable criminal assault. Instead, he sued

1 the Board of Education and the system-wide athletic director,
2 Jeffrey Sullivan, the principal at that time, Casey Crouse.
3 And when I refer to the individual defendants, Your Honor, I am
4 going to refer to them with the position that they held at the
5 time of the occurrences which are the subject before this
6 Court. So, in addition, he sued -- sued Sullivan and Crouse,
7 he sued the varsity head coach, Eric Wallich, the JV coach,
8 Vinny Colbert, and the athletic director, Mr. Doody, Joseph
9 Doody.

10 The allegations with respect to the -- excuse me. When
11 we look at the allegations in the complaint -- and I will come
12 back to them because there are some incorrect allegations that
13 have been developed in the record -- going to the facts first,
14 there is no notice to any defendant that there was a tradition
15 of brooming, sexual assault, or hazing within the Damascus High
16 School locker room at any time prior to Doe 1's assault on
17 August 1, 2017.

18 Jennifer Webster was the principal at Damascus High
19 School from 2013 to 2017. She testified -- and if the Court
20 wants me to give citations in the record, I can provide them,
21 where these facts are coming from, or if you just want the
22 facts, I will give the facts, and if you need a citation --

23 THE COURT: Well, if you have a reference handy --
24 don't spend a lot of time digging. We have a lot of things to
25 talk about.

1 MS. KANE: I do have it handy.

2 THE COURT: You can cite it.

3 MS. KANE: Jennifer Webster knew of no incident of
4 hazing, sexual harassment, or sexual assault occurring on the
5 Damascus High School football program. That's Defendants'
6 Exhibit 29, pages 13 and 71.

7 Mr. Doody had been involved --

8 THE COURT: Sorry. She had no notice; is that what
9 you are saying?

10 MS. KANE: Yes, sir. She had no notice that there
11 was -- there -- there is no evidence that anything had
12 happened. But I will go through --

13 THE COURT: Okay. Well, the different arguments I
14 understand.

15 So there is no evidence that any principal had notice of
16 any of these or only as to Doe 1?

17 MS. KANE: As to anybody.

18 THE COURT: Okay. Fair enough.

19 MS. KANE: As to anybody. We are trying to set the
20 stage, Your Honor, for what happened on August 1, 2017. And at
21 that time -- I am going to go through a list of the defendants
22 and people at the Board of Ed -- nobody, nobody had any
23 knowledge that there had been, or there is no evidence that
24 there had been hazing, sexual assault, or criminal assault in
25 the Damascus High School locker room.

1 Mr. Doody had been involved as the athletic director for
2 decades and knew of no incident of hazing, sexual harassment,
3 or sexual assault prior to August 1, 2017. Defendants' Exhibit
4, pages 177, 178.

5 Wallich, football coach at Damascus High School -- excuse
6 me. Mr. Wallich had been the coach at Damascus High School
7 since 2006. He knew of no incident of hazing, sexual
8 harassment, or sexual assault in the Damascus High School
9 football team prior to August 1, 2017. Defendant Exhibit 4,
10 page 14.

11 Mr. Colbert was the JV football coach at Damascus High
12 School and had been so since 2006. He was a stipend coach. He
13 knew of no incident of hazing, sexual harassment, or sexual
14 assault in the Damascus High School football team prior to
15 August 1, 2017. Defendants' Exhibit 40, Colbert depo, page
16 263.

17 Sullivan did not know of any incident of hazing, sexual
18 harassment, or sexual assault occurring on the Damascus High
19 School football team prior to August 1, 2017. Defendant
20 Exhibit 7, page 111.

21 Crouse had been the principal for one month at the time
22 of Doe 1's assault. She did not know of any incident of
23 hazing, sexual harassment, or sexual assault occurring on the
24 Damascus High School football team program prior to her tenure.
25 Defendants' Exhibit 2, pages 51, 33 to 36. All of these were

1 at ECF 227.

2 The Board of Education had not received a single
3 complaint of hazing, brooming, sexual harassment, or sexual
4 assault among the Damascus High School football program prior
5 to August 1, 2017, nor was the Board of Ed otherwise aware of
6 any such conduct.

7 Brian Scriven, the director of school support and
8 improvement from July 2014 to June 2018, testified that he had
9 no such knowledge at Defendants' Exhibit 28, pages 15 to 16.

10 Michael Hancock, the Damascus High School security team
11 lead at Damascus since 2015, testified in Defendants' Exhibit
12 31, pages 90 and 197, that he had no knowledge of any hazing,
13 brooming, sexual assault, sexual harassment.

14 Therefore, the record is clear and undisputed, Your
15 Honor, that there is no evidence of the existence or reporting
16 or knowledge of any complaint regarding the lack of supervision
17 of football players prior to August 1, 2017. No facts exist to
18 support Doe 1's opinion that the Damascus High School football
19 team purposely strove to win at all costs at the expense of
20 student safety. That's simply not true.

21 There was -- the students were trained in their health
22 body safety class on sexual harassment, bullying, and
23 intimidation. That comes from Morris -- Defendant Exhibit 17,
24 Morris, page 175. She was one of the Board's corporate
25 designees.

1 The Board of Education regulations include one against
2 bullying, harassment, and intimidation. Hazing and behavioral
3 expectations were addressed in the football team's annual
4 preseason meeting with student athletes. Exhibit 5, Colbert,
5 page 68. The deposition of Doe 1, he admitted that he knew
6 there was a zero tolerance for hazing. The athletes were told
7 hazing is not tolerated and would result in serious
8 consequences. His mother testified on page 123 that Wallich,
9 Colbert, and Doody -- that was Exhibit 26 -- had all mentioned
10 no bullying at the parent meeting.

11 With this background, Your Honor, we come then to the
12 August 1, 2017 incident. It was preseason. School was not yet
13 in session. It was practice before school started. Doe 1's
14 father dropped him off before practice. There is no evidence
15 in the record that the coaches were not there or that the
16 coaches were late. Doe 1 has testified that he was in the
17 locker room getting ready for practice. He was criminally
18 assaulted by his football teammates in the locker room. The
19 student assailants were not state actors. There is no evidence
20 that his assailants have ever committed any sexual assault
21 against anyone else. There is no evidence of how many seconds
22 or minutes Doe 1 was in the locker room before this happened.
23 There is no evidence regarding how many seconds or minutes it
24 had been since the last coach had been in the locker room.

25 Doe 1 went to practice after the incident. He did not

1 seek medical treatment. He did not report the incident to any
2 employee at Montgomery County Public Schools in 2017 or in
3 2018. He did not identify his assailants to any Montgomery
4 County employee -- Montgomery County Public Schools employee.

5 Those are the facts. The law is best set forth in the
6 case of *Segerman*, which is in the binder that we have provided
7 to the Court, *Segerman vs. Jones*. In that case, a teacher left
8 the room while young children were doing exercises. I believe
9 it was push-ups. Another student did the exercise incorrectly,
10 and one student hit another in the back of the head which
11 resulted in her chipping two teeth. In that case, the Court
12 determined that the probable cause of the incident was not the
13 teacher leaving the room, it was the intervening and unforeseen
14 action of the other pupil who did not do the exercises as
15 instructed.

16 Even if the teacher was negligent to leave the room, it
17 was speculative to assume that the lack of supervision caused
18 the injury because it would not have prevented the incident.
19 Speculation -- it says, The teacher is not an insurer of safety
20 of students, but, rather, he or she is held only to the
21 standard of reasonable care exercised by a person of ordinary
22 prudence.

23 Based on *Segerman* and the record before the Court, we can
24 look at the allegations in the amended complaint, the theories
25 against the defendants, all of whom are entitled to summary

1 judgment on this count.

2 The second amended complaint alleges that all of the
3 defendants were *in loco parentis* and owed a duty of reasonable
4 care to the plaintiff. They alleged that JV Coach Colbert
5 breached his duty -- had a duty to supervise the locker room.
6 They alleged that Wallich had a duty to supervise the locker
7 room or ensure that others did. They allege that Crouse, the
8 principal for one month, had the duty to ensure that the
9 coaches followed MCPS protocols and that protocols were in
10 place if a coach was not present so that the locker room was
11 supervised.

12 They allege that Doody supervised -- he was the athletic
13 director -- had to either supervise the locker room or ensure
14 that others did. They made allegations as to the system-wide
15 Athletic Director Sullivan, that he had a duty to ensure
16 Montgomery County Public School policies and guidelines were
17 implemented and enforced so students in after school programs
18 were appropriately supervised and to ensure that his staff --
19 and I say "his" because he didn't supervise anybody. That's
20 another fact. He didn't supervise anybody at Damascus High
21 School. And they allege that he had a duty to make sure that
22 people completed their training. The complaint alleges all of
23 these duties were breached and that the plaintiffs had injury.

24 With respect to each defendant, they are entitled to
25 summary judgment because there is no evidence they breached any

1 standard of care, or even if there was a breach, it in any way
2 proximately caused Doe 1's criminal -- unforeseeable criminal
3 assault by his teammates.

4 Casey Crouse had been in the position of principal for
5 one month. She had delegated supervision of the football
6 program to Athletic Director Doody. In that month, there is no
7 evidence she had any complaints about Mr. Doody. There is no
8 evidence she had any complaints about Mr. Wallich, the varsity
9 coach. There is no evidence that she had any complaints about
10 Mr. Colbert, the JV coach. She had not received any complaints
11 about hazing, sexual assault, or assault by students in the
12 football program.

13 Given that knowledge and *Segerman*, there is no breach of
14 any duty of care on her part, she's entitled to summary
15 judgment on Doe 1's negligence count.

16 With respect to Mr. Colbert, he had been an employee --
17 not -- well, he had been a stipend coach since 2006, so almost
18 11 -- I guess about 11 years.

19 THE COURT: Are we still on Doe 1 here?

20 MS. KANE: We are on Doe 1. All of this is Doe 1.

21 THE COURT: You are not making any motion with
22 respect to the other Does, are you?

23 MS. KANE: No, sir, not on negligence.

24 THE COURT: That's where we are.

25 MS. KANE: That's why separate motions were filed,

1 Your Honor, because there is two incidents, and the landscape
2 is different between Doe 1's incident and Does 2, 3, and 4.

3 THE COURT: There is no motion pending as to Does 2,
4 3, and 4?

5 MS. KANE: Not on negligence, so that's why the
6 record only counts for what happened up to and at the time of
7 Doe 1's assault.

8 THE COURT: Let's finish up with Doe 1.

9 MS. KANE: Okay. With respect to Colbert, he had
10 received no complaints regarding hazing, sexual assault, and
11 there is no evidence that he did anything wrong on August 1,
12 2017.

13 With respect to Mr. Wallich, he had not received any
14 complaints about Mr. Colbert. He had not received any
15 complaints about hazing or sexual assault in the football
16 program. Nobody had -- there was no evidence that anything had
17 occurred, and nobody had any reports of it. Mr. Wallich, the
18 varsity coach, had not received or observed any problems with
19 Mr. Colbert in the supervision of the locker room.

20 Mr. Sullivan was the system-wide athletic director. He
21 had no knowledge of any incident of hazing, sexual harassment,
22 or sexual assault occurring on the DHS football team prior to
23 August 1, 2017. He had no subordinate employees at Damascus
24 High School. He did not supervise Crouse. His general duties
25 are to oversee the Montgomery County Public Schools athletic

1 programs for the operations perspective with respect to
2 scheduling, budgeting, logistical operations. He does provide
3 -- distributes athletic policies and guidance to the athletic
4 directors and principals. He offers guidance to the athletic
5 directors, coaches, and principals, and he can direct a team to
6 forfeit a game if need be, but he does not supervise
7 principals, athletic directors, or coaches. He does not hire,
8 fire, promote, discipline, or evaluate coaches or assist with
9 the day-to-day operations of the schools such as how is the
10 locker room being supervised.

11 So, for these reasons, there is no evidence that
12 Mr. Sullivan breached any duty of care that he had with respect
13 to Doe 1. He had -- and summary judgment on the negligence
14 count against him should also be granted.

15 With respect to the Board of Ed, it appears to be a
16 vicarious liability claim and which rises and falls with the
17 claims, I guess, of the individuals, and the Board of Ed should
18 be entitled to summary judgment on the negligence claim as
19 well.

20 There is no evidence that there was any negligence by any
21 defendant, and even if the Court somehow finds there was, that
22 it proximately caused Doe 1's unforeseeable criminal assault by
23 his football teammates.

24 THE COURT: All right. Mr. Karpinski.

25 MR. KARPINSKI: Thank you, Your Honor. May it please

1 the Court, Your Honor, Kevin Karpinski on behalf of Mr. Joseph
2 Doody.

3 I am going to adopt Ms. Kane's arguments, and my argument
4 is also limited to Count One, Doe 1, as it relates to the
5 August 1, 2017 incident.

6 Mr. Doody was the athletic director and oversaw
7 approximately 44 of the athletic programs offered at Damascus
8 High School.

9 THE COURT: You are not making a motion as to any
10 other counts, then; is that correct, involving your client?

11 MR. KARPINSKI: That's correct, Your Honor. I have
12 withdrawn my motion for summary judgment as to the negligence
13 counts related to the October 31, 2018 incident involving Does
14 2, 3, and 4.

15 THE COURT: Very good. Go ahead.

16 MR. KARPINSKI: Okay. So the -- the incidents -- the
17 assault involving Doe 1 occurred on August 1, the school year
18 began on September 5, so this was an incident where this was
19 not even before the school year had begun.

20 As Ms. Kane has pointed out, there is no testimony that
21 anyone -- there were any incidents of hazings or assaults
22 before August 1. In fact, the sworn testimony from the former
23 principal, Ms. Webster, as well as the head coach, Mr. Wallich,
24 and Mr. Colbert as the JV coach, Mr. Doody, as well as a number
25 of other individuals that were deposed in this case, have all

1 testified that there were no incidents that preceded August 1
2 of 2017. And the opposition that was filed by Doe 1, quite
3 frankly, Your Honor, attempts to bootstrap incidents that
4 occurred after August 1 of 2017. There simply is no notice
5 that any of the defendants were aware of prior assaults
6 occurring at the Damascus locker room -- the Damascus locker
7 room or within the Damascus school.

8 Plaintiff has alluded to a lack of training, but as
9 Ms. Kane has pointed out, Doe 1 has conceded that there was a
10 preseason meeting that was held by the coaches for the Damascus
11 varsity and JV team. They presented a PowerPoint presentation.
12 They emphasized that they had a no hazing policy. It wouldn't
13 be tolerated. It would result in anyone being kicked off the
14 team. So there was training. The policies were in place to
15 prevent any hazing or harassment. There is no notice of any
16 incidents that occurred before August 1 --

17 THE COURT: No notice of any incidents at Damascus,
18 but why is there a policy in place? Where does that come from?

19 MR. KARPINSKI: Excuse me.

20 THE COURT: Why would there be a policy in place as
21 of that first incident? Why? Were there not incidents in
22 other high schools? There was an issue, wasn't there, floating
23 around out there in Montgomery County?

24 MR. KARPINSKI: Not as of August 1, Your Honor.

25 THE COURT: At Damascus. I am talking about the

1 county generally. No prior incidents anywhere else?

2 MR. KARPINSKI: Not as of August 1, Your Honor.

3 THE COURT: Okay.

4 MR. KARPINSKI: And certainly my client, Mr. Doody,
5 as the athletic director, would not be involved in those
6 issues. Certainly the record has not been developed to suggest
7 that either he or anyone else had knowledge of other incidents
8 occurring.

9 THE COURT: You didn't answer my first question,
10 though, which would be: Why would there be a policy about no
11 hazing and so on? Why would there have been a directive to the
12 students about that?

13 MR. KARPINSKI: I think best practices in any
14 jurisdictions. I mean, you don't necessarily need to have a
15 sexual harassment complaint in your workplace to have an
16 effective sexual harassment complaint policy because that's
17 just good practices to have.

18 Obviously, in a school system, you know, going back to
19 the beginning of time, school systems should discourage any
20 sort of abuse, hazing, intimidation of students, and so a
21 policy would be in place to go ahead and notify students, have
22 teachers on notice that that type of behavior would not be
23 acceptable.

24 So, in sum, Your Honor, there simply is no notice with
25 regard to the August 1, 2017 incident. The negligence claim

1 should fail. The defendants are entitled to summary judgment
2 on that count.

3 And unless the Court has any questions, I would
4 respectfully submit.

5 THE COURT: Let me hear from Mr. Ruff.

6 MR. RUFF: Good morning, Your Honor. This is Malcolm
7 Ruff, R-U-F-F.

8 On behalf of Doe Plaintiff 1 and his parents, we
9 whole-heartedly are in disagreement with the assertions that
10 have been put forth today that these allegations that we put
11 forth are incorrect.

12 First I want to just address the -- the date that this
13 incident occurred. I don't believe that there is anywhere in
14 the record where this date was solidified to a particular day.
15 What I recall from the record is that this was something that
16 happened during the preseason, in early August of 2017. And
17 there is a lot of red herrings that are being thrown out. The
18 fact that school wasn't in session yet does not mean that MCPS
19 was not operating under their policies, was not operating in --
20 in the capacity still, even though the classes weren't in
21 session, of standing in the shoes of the parents of this young
22 man.

23 Surprisingly, we have been told today that none of the
24 defendants or adults involved in this case are going to admit
25 that they have ever heard of brooming in Montgomery County

1 before August 1st. So, yes, there is no direct evidence on the
2 record that anybody -- any official or any teacher or staff
3 member at Damascus High School allegedly knew that this
4 brooming was going on, but the record is replete with testimony
5 from the young men who were on this football team who -- one of
6 whom had not even come to Damascus before he heard about what
7 was happening in the locker rooms.

8 So there is plenty --

9 THE COURT: Well, what was that? Are you talking
10 about just the plaintiffs, or are you talking about other
11 students?

12 MR. RUFF: I am talking about actually one of the
13 assailants, one of the worst assailants, he was identified as
14 J.C.A. in the case, he testified that before he even came to
15 Damascus, he knew exactly what was going on and that this was
16 going to be happening, and, ultimately, he ended up assaulting
17 and sexually assaulting Doe Plaintiffs -- being involved in the
18 sexual assault of Doe Plaintiffs 2, 3, and 4.

19 So let's talk about the negligence standard. It's very
20 low in Maryland. It's defined in the civil jury pattern
21 instruction as not doing something that a person using
22 reasonable care would do. Reasonable care is the caution,
23 attention, or skill a reasonable person would use under similar
24 circumstances. It's normally and very frequently, and
25 especially in Maryland, a question of fact for the jury. And I

1 have cases that I meant to include in the --

2 THE COURT: No need to talk about cases. I am mostly
3 interested in your factual evidence at this point. I know what
4 the law is.

5 MR. RUFF: It's *Giant Food, Inc. vs. Scherry*,
6 straight out of the jury instruction.

7 THE COURT: Don't need to spend a lot of time citing
8 cases. I need to hear what you think the factual evidence is
9 that fulfills those elements.

10 MR. RUFF: Thank you, Your Honor.

11 Meager evidence of negligence is sufficient to carry the
12 case to the jury.

13 I also want to dispel this notion that there is no
14 evidence that the coaches were not -- were not present -- were
15 potentially present when Doe Plaintiff No. 1, as has been
16 stated, was sexually assaulted by his teammates by having been
17 thrown face first into a locker, pinned down, had his pants
18 nearly pulled down, and was rammed in his anus with a
19 broomstick. That is preposterous for the defendants to assert
20 that there is no evidence that the coaches were not present
21 when this happened. They were not present long enough for Doe
22 Plaintiff No. 1 to be victimized by his own teammates, and
23 there is plenty of evidence on the record from these young men
24 that that was the normal course of business on this football
25 team.

1 Elements of negligence. There is duty to protect the
2 plaintiff from injury. This is the *Gambrell* case. Defendant
3 breached that duty, plaintiff suffered an actual loss or
4 injury, and the breach of that duty proximately caused the
5 plaintiff's injuries.

6 Well, *Gambrell* also went further to state that a public
7 school and its employees have a duty to provide supervision to
8 ensure the safety of its students and is liable for foreseeable
9 injuries proximately caused by the absence of adequate
10 supervision. Each of these defendants owed John Doe Plaintiff
11 No. 1 a duty that is recognized by law requiring them to
12 conform to a certain standard of conduct for his protection
13 against unreasonable risks. Each of them failed to meet that
14 duty. As a result of their failure, he was sexually assaulted.

15 There is more than a reasonably close causal connection
16 between their failure to meet that duty and his injuries
17 because but for their failure to be present to supervise these
18 young men and to stop this sexual assault, this young man would
19 never have been victimized.

20 The --

21 THE COURT: Let me stop you, though. I seldom have
22 too much substance from you on their notice of prior incidents.
23 You have talked about rumors. That's one thing. Now you are
24 talking about, I think, they should have been present, what, at
25 all times whether or not they had notice, and since they

1 weren't there at the occasion of this particular event, that's
2 a different kind of a breach?

3 MR. RUFF: I am getting there, Your Honor. And you
4 asked a very good question: Why would be there be a
5 supervision policy and what is that supervision policy? Well,
6 if we go with the reality that the coaches were not actually in
7 the locker room when this young man was victimized, there was a
8 violation that happened there of MCPS policy because the policy
9 is very clear that these students were to be supervised at all
10 times while they were in the locker room, while they were at
11 games, while they were at practice. There was no point, and
12 the record is completely clear that coaches must supervise
13 student athletes at all times before and after practices and at
14 both home and away games. That was a clear directive and --

15 THE COURT: Directive from whom?

16 MR. RUFF: From MCPS, the Board of Education. That
17 was a system-wide directive that everyone actually knew because
18 that summer, right before the summer athletics started, there
19 was a memo issued by Defendant Sullivan which stated that very
20 policy and made it very clear that what happened to Doe
21 Plaintiff No. 1 should never have happened because these young
22 men should have been supervised.

23 THE COURT: Were there incidents similar in nature at
24 other high schools in the county prior to the events?

25 MR. RUFF: There is nothing on the record about prior

1 incidents, but there is plenty on the record about some other
2 incidents that occurred intermittent between this incident and
3 the October 31st, 2018 incident, Your Honor.

4 But what really gives notice is an additional policy,
5 which was a training policy, a training module that was
6 required of all coaches, all athletic directors from the
7 National Federation of High Schools -- High School Sports,
8 which was a training on bullying, hazing, and it instructed all
9 of these coaches that when you do not supervise young men,
10 young high school boys, that this very type of situation would
11 occur, that this type of victimization, sexual assaults would
12 occur.

13 And, specifically, it quoted an example of a high school
14 football camp in New Mexico where five young men were actually
15 charged criminally for brooming another player during football
16 camp, and it was a cautionary tale, Your Honor, to tell all of
17 the coaches in the MPS -- excuse me, MCPS system that if you do
18 not supervise your players per our policy, this is what can
19 happen. This is why you need to be in the locker room at all
20 times when your players are in the locker room, you need to be
21 supervising them when they are at their games, and you need to
22 be supervising them when they are at away sites.

23 There was plenty of notice. And what's more egregious is
24 that these defendants had a duty to ensure that the coaches,
25 Wallach and Colbert, had taken this training. Well, the record

1 shows that they didn't ensure that. Athletic Director Doody
2 did not ensure that Mr. Colbert and Mr. Wallich took this
3 training. He admitted that he took the training, but he
4 actually stated that he couldn't even remember --

5 THE COURT: Well, what did the training consist of?

6 MR. RUFF: It consisted of PowerPoints. I believe it
7 was a video of directives and best practices, as was stated.
8 And I wanted to just quote what Mr. Karpinski said. You know,
9 the reason why there is a policy is not just best practices.
10 He stated it's to put people on notice. He said teachers on
11 notice. Well, not just the teachers, the coaches to be put on
12 notice that if you are unable to follow the policy, bad things
13 will happen. And that's exactly what Principal Crouse stated
14 in her deposition is that when -- and she knew that when young
15 men, football players, are unsupervised, bad things can happen.

16 THE COURT: About another minute. But let me ask
17 you: Did the policy have a particular athletic reference, that
18 is, to the way that young men might act in athletic situations?

19 MR. RUFF: This was -- this was a athletic --
20 athletic department -- system-wide athletic department
21 training, and the example was about football, coincidentally, and
22 about brooming, and it was -- it was supposed to be taken by
23 every single coach in the system.

24 THE COURT: And Doody took it, but the others did
25 not?

1 MR. RUFF: Doody had taken it some years before as an
2 athletic director, but there is evidence that -- and in
3 Mr. Sullivan's deposition, he testified that the course is
4 required for coaches to complete before they are even eligible
5 to coach. So that's why Mr. Sullivan is also -- has violated
6 his standard of care. I understand that Ms. Kane has said that
7 Mr. Sullivan did not supervise anybody, but that's not what I
8 remember from his testimony.

9 If I could just get one second, Your Honor?

10 THE COURT: Well, was it his policy? Did he sign off
11 on these policies?

12 MR. RUFF: Yes. He validated these policies, as
13 Ms. Kane said. It was his job to provide these trainings to
14 all of the athletic directors. What he said was he oversaw
15 operations of athletic programs, including athletic directors
16 and the administration of the program as a whole. He was
17 involved in the enforcement of rules; yet, he thoughtlessly
18 disregarded his duty to only permit coaches in the MCPS program
19 who had complied with these mandatory trainings.

20 THE COURT: Let me ask you just a quick question.
21 Then you need to wind up. What was the follow on to determine
22 whether or not someone had complied? Any follow up at all?

23 MR. RUFF: So I think there is a difference between
24 the years as to how the -- the -- how this was monitored, but
25 the long and short was the principal, Ms. Crouse, had a duty to

1 ensure that Mr. Doody made sure that all of the coaches had
2 taken these trainings.

3 THE COURT: So his omission would be not determining
4 that they had, and their omission, in part, was not having done
5 it?

6 MR. RUFF: Not just that, Your Honor. Also not
7 implementing the supervision policy. Right? So, like I said
8 --

9 THE COURT: All right. Very good.

10 MR. RUFF: And they were not in the locker room when
11 my client was victimized.

12 THE COURT: Well, that, I understand.

13 MR. RUFF: That was in direct violation of the
14 policy, Your Honor.

15 THE COURT: Fair enough.

16 Let me hear back from you, Ms. Kane, in rebuttal.

17 MS. KANE: Your Honor, I did not hear one thing from
18 Mr. Ruff as to an incident that had occurred prior to August 1,
19 2017.

20 THE COURT: An incident at Damascus?

21 MS. KANE: Yes, sir. This -- Mr. -- Doe 1 was the
22 first incident. There is no evidence in the record that
23 anything happened prior to him. No evidence. And Mr. Ruff did
24 not point out anything. He referenced some incidents that
25 happened after he admitted there was no direct evidence. This

1 was the first.

2 THE COURT: But are you saying that it could not be
3 notice that there was, A, a policy in place, B, with examples
4 specific to football that people in the Damascus athletic
5 organization should have known and didn't comply with? Why
6 would you need actual notice of an incident at Damascus to be
7 on notice that this kind of thing is a problem?

8 MS. KANE: There is no evidence not only that nothing
9 happened at Damascus but any other school either. There is no
10 evidence that there had been any brooming at any school at any
11 time prior to Doe 1. The Court had asked about other
12 incidents. Zippo. Nothing in the record.

13 With respect to why was the training -- why was there a
14 policy on bullying, intimidation -- bullying, hazing, and
15 intimidation, because Montgomery County Public Schools goes
16 above and beyond the legal requirements. They had that policy
17 in place for years because they want to do the best that they
18 can. It's not the only policy they have. There is one against
19 sexual harassment. There are other policies. And there is
20 sexual harassment training as well to the staff.

21 These were long-term coaches. Mr. Wallich had been
22 coaching since 2006, Mr. Colbert since 2008, and just because
23 there is an allegation that they missed -- and let me back up.
24 With respect to the training that Mr. Ruff mentioned that
25 included one slide that mentioned a brooming incident in

1 Tennessee or New Mexico, that there is no evidence in the
2 record that Mr. Wallich did not take that training.

3 THE COURT: Does he contend that he did? Or are you
4 just saying --

5 MS. KANE: I am just saying there is no evidence in
6 the record, Your Honor, because I looked at it, and I could
7 find nothing to show that Mr. Wallich missed that training.

8 With respect to -- I don't think that it really matters,
9 but the J.C.A. cite that he mentioned of somebody else having
10 hearsay about brooming, number one, that was referenced in the
11 opposition. It wasn't included in the exhibit that Doe 1
12 referenced. That wasn't in there. And even what they cited
13 about that was hearsay, and there was no timing on it. So that
14 would not in any way impact summary -- summary judgment on the
15 negligence counts against anybody.

16 The record is clear that there was no negligence on the
17 part of the Board. There were policies in place. There was
18 training in place to the students regarding sexual harassment.
19 Doe 1 went, his parents went to the parent meeting, and the
20 school also had no notice that there was any violations of that
21 policy going on. And then Doe 1's incident happened. There is
22 no proximate cause here if there was one miss of one training
23 by one of the coaches.

24 THE COURT: Let me zero in on one particular -- if
25 there is a policy that says you got to supervise, essentially,

1 boys in an athletic setting to make sure that there isn't
2 hazing, why isn't it sufficient to say they didn't do it, they
3 weren't there when this happened, there wasn't anybody on site?
4 Isn't that enough? Why do you need actual notice?

5 MS. KANE: No, Your Honor. It's not enough because
6 the mere fact that somebody was not in the locker room, an
7 adult was not in there at the moment in time when Doe 1 was
8 assaulted does not mean they were negligent. There is no
9 evidence of how long nobody -- no adult was in that locker
10 room. Was it seconds? Was it minutes? There is no evidence
11 that it had been an extended period of time that would raise a
12 jury question of whether or not there was negligence. There is
13 nothing, nothing in the record that would support that they
14 were derelict in their duties.

15 And what the testimony is with respect to supervising the
16 locker room at all times is it means you are in earshot. You
17 don't have to watch every kid every second in the locker room,
18 but you can be within earshot to be called if -- or make your
19 rounds if something happens.

20 There is no evidence that there was any breach of that.
21 Doe 1 did not report this, and there is nothing in the record
22 --

23 THE COURT: Well, it's not what Doe 1 reported. It's
24 what they knew before.

25 MS. KANE: Yeah. It's what they knew before.

1 THE COURT: Or should have known. Should have known.
2 What they knew or should have known.

3 MS. KANE: Right. Right.

4 THE COURT: Okay. Quickly, Mr. Karpinski, do you
5 want to add a word or two by way of rebuttal?

6 MR. KARPINSKI: I do not.

7 THE COURT: Anything more on negligence, then?

8 Let's move on to Count Two. In fact, I am going to try
9 and --

10 MR. RUFF: I will cover it under gross negligence.

11 THE COURT: We are going to try and break around
12 12:30 so that we have a clean break in the argument so we don't
13 get in the middle of one and then break for lunch.

14 So let's go on to gross negligence. Who -- again,
15 Ms. Kane, you start, I believe. Right? Are you with me,
16 Ms. Kane?

17 MS. KANE: I am with you, Your Honor.

18 Gross negligence, Count Two, defendants move -- I'm
19 sorry, Mr. Sullivan moves for summary judgment on that count,
20 and I am going to incorporate first --

21 THE COURT: I have only -- let's see. It's only
22 Sullivan that is -- it's only against Sullivan, that count. Is
23 that right?

24 MS. KANE: Yes.

25 THE COURT: All right.

1 MS. KANE: Yes. So on behalf of Mr. Sullivan, the
2 system-wide athletic director, there is no evidence of gross
3 negligence on his part, and summary judgment would be
4 appropriate.

5 Excuse me one second.

6 The standard on gross negligence is a high one, Your
7 Honor, and there is no evidence in the record that would
8 support summary judgment -- gross negligence requires a -- it's
9 more than vague negligence. It requires a -- an intentional
10 failure to perform a manifest duty in reckless disregard of the
11 consequences as affecting the life or property of another, and
12 also implies a thoughtless disregard of the consequences
13 without the exertion of any effort to avoid them. Stated
14 conversely, a wrongdoer is guilty of gross negligence or acts
15 wantonly and willfully only when he inflicts injury
16 intentionally or is so utterly indifferent to the rights of
17 others that he acts as if such rights did not exist.

18 THE COURT: Well, I don't think there is a contention
19 that Mr. Sullivan acted intentionally. They are saying it was
20 wanton and reckless. That's what they are saying.

21 MS. KANE: They are saying he's wanton and reckless.
22 The policies are in place, and there is -- his job duties did
23 not require implementation of those policies. He helped
24 disseminate the policies. He was not the one to implement
25 them. That was done at the school level, not from his

1 position. And there is no evidence that he was utterly -- had
2 an utter disregard for the safety of others with respect to the
3 way that he was handling the -- the policies.

4 The *Stracke vs. The Estate of Butler* case also sets forth
5 the standard, Your Honor -- I think I read the one from the
6 *Barbre v. Pope* -- and there is simply no notice here to show a
7 wanton and reckless disregard for the safety of the students.
8 He has the policies in place. He's the system-wide director of
9 athletics. He's responsible for basically the logistical
10 operations, such as budgeting and scheduling. There is -- with
11 respect to the training, that would be monitored at the school
12 level, not by him, whether or not somebody took the training,
13 and there is no evidence from which --

14 THE COURT: He would not be responsible for seeing to
15 the implementation of the overall policy?

16 MS. KANE: It's not his obligation as the system-wide
17 director of athletics to see whether any specific coach took
18 any specific training. They would be monitored by --

19 THE COURT: You mean it wasn't written into his job
20 description --

21 MS. KANE: Yes.

22 THE COURT: -- or it shouldn't be arguable that it was
23 something that he should have done?

24 MS. KANE: No.

25 THE COURT: It wasn't written into his job

1 description. If you say, as the overall supervisor, well, now
2 you, as a lower-level person, implement this, you are then
3 exonerated from any responsibility?

4 MS. KANE: I'm sorry, sir. I missed that.

5 THE COURT: I want to follow your argument. You say
6 he wasn't responsible. The school level was responsible. But
7 he's the overall supervisor. Right?

8 MS. KANE: No. He does not supervise the principals.
9 He does not supervise the athletic directors. He does not
10 supervise the coaches.

11 THE COURT: Well, is it his policy? Is he the one
12 who implements the policy?

13 MS. KANE: They are not arguing that there is a
14 problem with the policy. They are claiming it wasn't properly
15 implemented.

16 THE COURT: Right. And you are saying he had no
17 responsibility to implement it?

18 MS. KANE: That's right.

19 THE COURT: Well, that's your argument.

20 MS. KANE: Yes.

21 THE COURT: You are losing me a little bit on that.
22 I am not sure why he would not be. Just because he designated
23 somebody at the school level to implement it, Here is my
24 policy, now you implement it, I am off the hook, that's what I
25 understand you --

1 MS. KANE: It wasn't his designation. It was because
2 -- say if the principal delegates something to the athletic
3 director, then -- at the school level, then she's still
4 responsible for what he does.

5 THE COURT: Is he responsible to find out what's
6 going on?

7 MS. KANE: No.

8 THE COURT: He can be ignorant about what's
9 happening, whether a plan is being implemented or not? Here is
10 my plan, you implement it, but don't come back to me and tell
11 me whether it's being enforced or not; is that a fair
12 statement?

13 MS. KANE: Well, Your Honor, I think that the Board
14 certainly cares about implementation of the policies. It cares
15 about the students. And he certainly cares about whether
16 things are being done. But there is a hierarchy of who is
17 responsible for what. It's not his policy, per se. He
18 disseminates it. The Board creates the policy. He simply
19 passes it out to make sure that the athletic directors --

20 THE COURT: Well, I understand your argument. I need
21 you to wind up because we are going to jump over to Mr. Ruff
22 for a minute.

23 MS. KANE: For those reasons, Your Honor, there is no
24 evidence of wanton or willful or utter disregard for the safety
25 of others, and he's entitled to summary judgment.

1 THE COURT: Very good.

2 Mr. Ruff.

3 MR. RUFF: Your Honor, there is plenty of material in
4 dispute of fact as to whether or not a reasonable juror could
5 find that Mr. Sullivan recklessly disregarded his duty and
6 disregarded the consequences to these young men without, you
7 know, making any effort and despite his duty to do so, which
8 then led to Doe 1 being a victim of sexual assault.

9 I want to talk about the policies that were in place.
10 Mr. Sullivan -- it's being argued that Mr. Sullivan wasn't
11 supposed to be implementing the policies, but first, he stated
12 himself he oversaw the operations of the athletic programs for
13 the entire system. He was the system-wide director of
14 athletics, and he had just started right before this incident
15 happened, and he promulgated this policy as he came into the
16 door. Right?

17 And so we are supposed to say that as a matter of law, he
18 had no duty to make sure that this policy was being followed?
19 When Mr. DeGonia asked, I believe it was Ms. Crouse -- or Mr.
20 Sullivan, Dr. Sullivan shared his expectation was that each
21 school should have a supervision plan, but MCPS left the
22 creation of the plan to the individuals who were athletic
23 directors and administrators. Right?

24 So he had an expectation --

25 THE COURT: That's what Sullivan said?

1 MR. RUFF: That's what Sullivan said from his
2 deposition. That's page 96 of his deposition, line 7 through
3 10.

4 THE COURT: All right.

5 MR. RUFF: And he said that's a fair statement, that
6 at the time prior to this incident, and I believe that was the
7 '17 incident, each individual school was left to come up with
8 their own supervision plan, but he had an expectation that the
9 plan be implemented. So for the -- the defendants to argue
10 that Mr. Sullivan had no duty for implementation, to oversee
11 that, is -- is disingenuous.

12 He also stated he was involved in the enforcement of
13 rules. He disregarded his duty because he also talked about
14 the fact that only coaches that -- in the MCPS system who had
15 complied with the trainings that were required were allowed to
16 remain as coaches. Right? And at the Damascus High School
17 level, the -- the athletic director didn't even know that. He
18 testified in his deposition that he thought that if the coaches
19 hadn't finished their training, the mandatory training that
20 taught them that they needed to supervise these young men to
21 make sure they didn't get rammed in the anus, that they can
22 still coach.

23 Well, Mr. Sullivan said specifically, You cannot be a
24 coach in this system if you have not finished the mandatory
25 training, and he didn't ensure that the mandatory training was

1 taken. He didn't ensure that the supervision policy was taken
2 because my client was not supervised, and because of that, he
3 was violated.

4 So what we are talking about here is a reckless disregard
5 straight out of the -- the pattern jury instruction that is a
6 question of fact, and it is for the jury to determine whether
7 Mr. Sullivan, because he did not follow through on his
8 implementation of these policies and the trainings and ensure
9 that only coaches that had submitted to this mandatory training
10 were actually coaching these young men and -- *in loco parentis*,
11 standing in the -- the shoes of these fine people in the
12 galley, and taking care of these young men who were vulnerable
13 based on a training that they knew about. They had a direct
14 example right on point of what happened to this young man, Doe
15 No. 1.

16 If I could just have one second, Your Honor.

17 So he failed to track whether Coach Wallich, Coach
18 Colbert had undertaken these trainings. He admittedly knew
19 that there was a failure of the Montgomery County Public School
20 system staff to follow the supervision policy creating an
21 unacceptable risk to the safety of students; yet, he didn't
22 ensure that the supervision policy was followed.

23 He had a -- he stated he had a clear responsibility to
24 ensure that the coaches received the required trainings in
25 order to be a coach in the system. He knew that -- the

1 consequences that could happen to a student if supervision
2 didn't occur. He further -- this is all from his deposition --
3 he further knew that -- the consequences that could happen to a
4 student if they became the victim of a sexual assault. So he
5 understood these consequences, and recklessly, per our
6 argument, and, clearly, a reasonable juror could see that our
7 way.

8 THE COURT: All right.

9 MR. RUFF: He disregarded that.

10 THE COURT: All right. Very good. Thank you, sir.
11 That's all for Sullivan.

12 I will hear you now about Count Three, Defendant Crouse,
13 Ms. Kane. Are you going to argue this, Ms. Kane?

14 MS. KANE: Yes, Your Honor.

15 With respect to Casey Crouse, she had been the principal
16 one month at the time of this occurrence. Jennifer Webster had
17 been the principal prior to that time, and there had been no
18 evidence of any problems in the football program with respect
19 to any sexual assault, sexual harassment, hazing, or any other
20 evidence in the locker room.

21 Ms. Crouse -- there is no evidence in the one month that
22 she was there, that she came in -- Mr. Doody had been the
23 athletic director for decades. Mr. Wallich had been the
24 varsity coach since 2006, so for 11 years. Mr. Colbert had
25 been the JV coach since 2008, so nine years. There was no

1 indication to her that there were any problems in the program.

2 There is no evidence of, first, no negligence, as has
3 already been argued, but clearly none of gross negligence and
4 utter disregard or reckless disregard for the safety of the
5 students. No evidence whatsoever to her that she was grossly
6 negligent in her duties as principal at Damascus High School.

7 THE COURT: All right.

8 MS. KANE: The Court's indulgence.

9 THE COURT: That's fine.

10 MS. KANE: And unless there is questions from the
11 Court, she should be entitled to summary judgment.

12 THE COURT: No. That's fine. You don't need to use
13 all your minutes. That's fine. Whenever we can get --

14 MS. KANE: I will advocate them elsewhere, Your
15 Honor, if I don't use them.

16 THE COURT: Very good.

17 Mr. Ruff.

18 MR. RUFF: Thank you, Your Honor.

19 Ms. Crouse admitted in her deposition that she knew the
20 purpose of requiring supervision in the locker room at all
21 times when students were there was, in part, to make sure that
22 hazing did not happen and to support student safety. She
23 admitted that if students are not supervised, bad things can
24 happen.

25 Despite this knowledge, she admitted that during her time

1 as the principal, and in that first moment, she never asked the
2 athletic director to make sure that the students were always
3 supervised in the locker room because, according to her, she
4 didn't have a reason to, as they have stated. Defendant Crouse
5 never even read the directive, the memo that Mr. Sullivan
6 issued in July when she started in 2017, so she had no idea
7 what the actual policy was being sent to her own athletic
8 department.

9 She thoughtlessly delegated the supervision of athletics
10 to Mr. Doody, and she admitted that she did not check to see if
11 Defendant Doody was actually doing his job because he was
12 experienced, but guess what, he wasn't. She admitted that she
13 did not even tell Mr. Doody that he had to ensure the
14 supervision of these players because there was a standing
15 expectation, but she also had to admit that she was the one
16 that was responsible for ensuring that Defendant Doody properly
17 oversaw the JV football players and their supervision.

18 She had to admit that she was required by the department
19 -- excuse me, by the system not to just delegate. She said
20 this from her own mouth, so I am not certain why an argument
21 would be made that she delegated the duty and that's all she
22 had to do. From her own mouth, she was required by the system
23 not to just delegate supervision duty, but to observe and
24 monitor the athletic program, checking the progress and quality
25 of the athletic program. Right?

1 She admitted that she knew that when a student becomes
2 the victim of a student-on-student sexual assault, the student
3 will very likely suffer -- and I am talking -- this is straight
4 from her deposition -- will suffer serious negative
5 consequences as a result. She admitted that she had an
6 obligation to ensure that there was an individualized
7 supervision plan for each team in the system at Damascus High
8 School.

9 She admitted that unsupervised students sodomizing their
10 teammates was a foreseeable issue and that the system safety
11 trainings like the bullying and hazing -- and I forget -- what
12 kind of behaviors was it called? -- bullying, hazing and
13 dangerous -- or some kind of -- dangerous behaviors were
14 designed to equip her staff members with methods to minimize
15 and prevent foreseeable risks that were likely to arise.

16 She admitted that she was responsible for ensuring
17 coaches completed their mandatory student safety trainings;
18 however, she also admitted that she had no idea that Coach
19 Wallich and Coach Colbert had not completed the required
20 bullying and training modules. She had to admit specifically
21 on the record she had not done her job.

22 She also admitted that the MCPS supervision policy was
23 the bare minimum requirements. I am not certain why defendants
24 are saying that this was above and beyond when the principal of
25 the school said out of her own mouth, This supervision policy

1 was the bare minimum requirements to minimize the potential
2 risks to the Damascus High School students.

3 Ultimately, she had to admit that the failure of the
4 Damascus High School staff -- of a Damascus High School staff
5 member to follow the supervision policy creates an unreasonable
6 risk of harm to Damascus High School students.

7 THE COURT: I need to just ask one question. Then I
8 am going to have to move on. What do you answer to the
9 argument that she had only been on the job a month?

10 MR. RUFF: That in that month, she was grossly
11 negligent, that she did not do her job. And she admitted to
12 that. She did not monitor. She did not observe. She
13 delegated, and had to admit that delegating a duty, even if the
14 classes aren't in session, there is at least a genuine dispute
15 of fact as to whether or not she should have been, as she
16 stated from her own mouth, monitoring, observing, and ensuring
17 that the supervision policy was being followed, and not
18 creating, as she said, an unreasonable risk to these young men,
19 which, surprise, surprise, ultimately happened because Mr. John
20 Doe No. 1 was sexually assaulted.

21 THE COURT: What do you say to her argument that she
22 had so many things on her plate -- I was trying to do so
23 many things at once, maybe I didn't have a chance to verify
24 whether there was appropriate monitoring of the anti-hazing
25 policy?

1 MR. RUFF: Well, I am not certain that the Board has
2 asserted that argument.

3 THE COURT: Maybe they haven't.

4 MR. RUFF: But I would say that, you know, as you
5 take the helm of any leadership position, it's important to
6 prioritize. And if you are standing in the shoes of parents,
7 the number one priority at a school is going to be safety, and
8 if you cannot take safety as the number one priority and ensure
9 that the number one -- you know, at least when you get off the
10 ground, that you are on solid ground as far as your safety
11 policies are concerned, then you have your priorities mixed up.

12 THE COURT: All right. Very good. All right.

13 We are next up with regard to Defendant Doody, and that
14 is you, Mr. Karpinski.

15 MR. KARPINSKI: Thank you, Your Honor.

16 I have moved for summary judgment as to all four of the
17 Doe Defendants. As to Doe 1, I am going to incorporate what I
18 have already said, which is there was no notice of any problems
19 at the school. There were policies and procedures in place,
20 and there is no evidence of any willful or wanton behavior by
21 Defendant Doody that would give rise to a claim for gross
22 negligence.

23 As to all of the -- the Doe Plaintiffs, Your Honor,
24 Defendant Doody is entitled to summary judgment on the
25 negligence claim. He's not a coach, Your Honor. He's the

1 athletic director. He oversees a variety of programs within
2 Damascus. He was not the one tasked with supervising the
3 locker rooms. In fact, by policy, the coaches were required to
4 supervise the locker rooms and were paid by stipend to do so.
5 MCPS had a number of policies in place addressing bullying and
6 hazing by students within MCPS, and that information was
7 disseminated by Mr. Doody to the coaches of the varsity and JV
8 football teams. Mr. Wallich and Mr. Colbert had been coaches
9 at Damascus for a number of years.

10 I think there has been a lot of emphasis put on the lack
11 of training of this one incident. When you look at it -- I
12 think when you look at it, the big -- you know, you look at the
13 overall picture, there is no question that these coaches had
14 received training with regard to hazing and bullying with
15 regard -- as it relates to the football team, and that
16 information had been conveyed to all of the players.

17 So to say, Well, you didn't get this training, this
18 particular training, well -- but it's undisputed that in the
19 larger grand scheme of things, training had -- the information
20 had been conveyed to not only the -- the plaintiffs and the
21 perpetrators, but it was to everyone on the varsity football
22 team.

23 So to say, Well, a coach could have seen this one slide
24 and this would have made a difference, that's highly
25 speculative when the coaches would have a preseason meeting,

1 and they would say, Listen, hazing is not tolerated; we have a
2 zero tolerance policy for it; you are not to intimidate; you
3 are not to ridicule; you are not to physically assault; you are
4 not supposed to do any of those things; none of that is
5 acceptable. And so that information was conveyed by Defendant
6 Doody to the coaches, and that information was conveyed to the
7 players.

8 THE COURT: Give me some timeline here. When is it
9 conveyed to the coaches? When is it conveyed to the players?

10 MR. KARPINSKI: So, generally, Mr. Sullivan would
11 have a meeting with the athletic directors before the school
12 year began, and the coaches, themselves, each year would have a
13 preseason --

14 THE COURT: So there would have been a meeting with
15 who? With -- with Doody?

16 MR. KARPINSKI: Mr. Sullivan would have met with the
17 athletic directors; then Mr. Doody would have met with the
18 coaches. The coaches then --

19 THE COURT: But Doody is the director. He meets with
20 Sullivan. Right?

21 MR. KARPINSKI: Correct.

22 THE COURT: And then Doody is supposedly meeting with
23 the coaches?

24 MR. KARPINSKI: Correct. And the coaches, it's
25 undisputed, Your Honor, did have preseason meetings where they

1 laid out their expectations with regard to Code of Conduct by
2 the players. The parents signed a contract that basically said
3 that they agreed that there would be no hazing that would be
4 permitted to occur. And so that information was conveyed by
5 Mr. Doody to the coaches, and the coaches then did convey that
6 information to the students. And Mr. Doody --

7 THE COURT: So we are talking about Wallich and
8 Colbert then. Right?

9 MR. KARPINSKI: Correct.

10 THE COURT: All right.

11 MR. KARPINSKI: And in terms of expectations,
12 Mr. Doody testified that it was his expectation that, quote,
13 when you enter a locker room to unlock it, you supervise the
14 students while they are there, and when you are ready to leave,
15 you need to go ahead and sweep the locker room and make sure
16 that everyone is out, and then you have to lock it behind you.

17 Mr. Wallich basically testified that it was his
18 responsibility to go ahead and supervise the locker room. It
19 was supervision -- it was the responsibility of the coaches to
20 go ahead and supervise the locker room, and that it should be
21 locked if, in fact, there was no one in there.

22 Mr. Doody, as the athletic director, is attending to a
23 variety of things. He's not necessarily attending to the
24 supervision of the locker room at any given time.

25 THE COURT: Well, it sounds like the argument I am

1 hearing about Sullivan, his -- his oversight is as to these
2 things, someone else is supposed to actually implement, so if
3 they don't do it, he's off the hook. Is that right? They are
4 supposed to be there when the students come in -- or the
5 football players, and then sweep the locker room when practice
6 is over. Because he's not the guy who does that, one of the
7 coaches is, he can't be responsible?

8 MR. KARPINSKI: I think that Mr. Sullivan is, as the
9 athletic -- as the supervisor of athletics, conveys what the
10 policy is of MCPS. Mr. Doody then is responsible for conveying
11 it to the coaches, and that -- that, in fact, did occur.

12 Now, that's why we did not move for summary judgment on
13 the negligence claim because, obviously, there was a break down
14 in terms of the supervision, but, you know, gross negligence is
15 not big negligence, Your Honor. It is gross negligence. It's
16 willful and wanton conduct.

17 And it's not as if information wasn't passed along. On
18 the day that this incident happened, Mr. Doody wasn't at the
19 school. He didn't know that Mr. Colbert's car had broken down
20 and was running late and that there were no other coaches or
21 other individuals that were in the -- in the locker room. He
22 didn't know that -- that the players were permitted to remain
23 in the locker room notwithstanding the fact that there -- that
24 there was not a coach present.

25 And, in fact, I think what you are going to hear in

1 rebuttal is, well, there were these incidents that occurred
2 between August of 2017, and there were no -- nothing that
3 predates it, that's why summary judgment as to Doe 1 is
4 appropriate as to all of the -- all of the claims, but between
5 August of '17 and October 31 of 2018, there were reports made
6 by certain adults. But most importantly, Your Honor, one of
7 the reports was by -- I will just use her initials -- C.V. and
8 J.V. reported an incident of an assault, but there is nothing
9 in the record that suggests that that was reported to anyone
10 other than Mr. Colbert. It wasn't reported to Mr. Doody that,
11 in fact, that had occurred.

12 And there was a separate report by an individual by the
13 name, just her initials, F.H., that was reported to Ms. Crouse
14 in November of 2017, again, after Doe 1, but by the time
15 Mr. Doody was informed of any such allegations, he didn't know
16 the identity of the student, didn't know any of the
17 particulars, the matter had already been reported to -- by
18 Ms. Crouse to the student resource officers and to Montgomery
19 County Police Department Special Victims Unit.

20 The record is devoid of any fact that Mr. Doody knew of
21 the full scope of what the allegations were, other than Brian
22 Scriven asking whether there was a conversation with
23 Mr. Wallich and Mr. Doody to see whether they knew of any
24 evidence or they knew of any knowledge of any inappropriate
25 behavior occurring in the locker room, to which Mr. Doody said

1 he did not.

2 So, again, while the -- the plaintiffs, and we concede,
3 and that's why we -- I withdrew the motion for summary judgment
4 on negligence because there was an issue in terms of the
5 training that was done, notwithstanding the fact that these
6 were long-standing coaches. Mr. Wallich, he is a teacher, so
7 he was not only a coach, he actually received MCPS training as
8 a teacher on harassment, bullying, intimidation in the
9 workplace, but there is no evidence of gross negligence. There
10 is no reason that Doody knew that the locker room was not being
11 supervised on the day of this incident.

12 Now, what the plaintiffs have been able to point to as it
13 relates to Mr. Doody and what he knew -- and I don't condone
14 it, Your Honor, but let's be realistic -- the allegations to
15 what Mr. Doody knew about was horseplay in the hallways, which,
16 unfortunately, happens in almost every high school in the
17 country, there was some vandalism to locker rooms and things of
18 that nature, but he was not aware of issues with regard to
19 sexual assaults. And certainly --

20 THE COURT: Well, let's maybe not put such a fine
21 point on it. You talk a lot about sexual assaults, even, I
22 suppose, sexual harassment. This is a physical assault, isn't
23 it? That's really what it is.

24 MR. KARPINSKI: Well, yes, any physical assault --

25 THE COURT: Well, it may make it more acute and more

1 offensive that it's sexual, but if you were beating somebody
2 with a stick instead of putting it up his anus, it would be the
3 same issue, wouldn't it? You are allowing an assault to occur.
4 Right?

5 MR. KARPINSKI: I don't disagree, Your Honor, and to
6 that end, Mr. Doody was not aware of any physical assaults that
7 were occurring at all.

8 What he was aware of was kids running up and down the
9 hallways and teachers complaining about it. He was aware of
10 some vandalism that was occurring inside the locker room. But
11 none of that was tied to physical assaults that would give rise
12 --

13 THE COURT: I need you to wind up. Sorry. We are
14 kind of moving along.

15 MR. KARPINSKI: Sure. So unless the Court has any
16 questions, I would respectfully submit there is insufficient
17 evidence of gross negligence, and Defendant Doody is entitled
18 to summary judgment on Count Four as to all four plaintiffs.

19 THE COURT: All right. Mr. DeGonia.

20 MR. DeGONIA: Yes, Your Honor. And my comments are
21 addressed to Does 2 through 4.

22 THE COURT: Okay.

23 MR. DeGONIA: And --

24 THE COURT: I don't know that I need to hear Mr. -- I
25 have Mr. Ruff as well I guess. Okay. Go ahead.

1 MR. DeGONIA: And so it -- it may be slightly
2 different. And, so, the Court has heard a lot about what
3 Mr. Doody didn't know and what he didn't do, and precisely to
4 that point, this is about, for gross negligence -- and I am not
5 going to belabor the law because I know the Court knows the
6 standard of care, and we are talking about gross negligence,
7 it's negligence plus -- is the complete and utter indifference
8 that Mr. Doody performed, or lack of a performance of his
9 duties, his obligations.

10 He was the athletic director. We have heard coaches were
11 coaches for a long time. He was an athletic director for a
12 long time. We haven't heard from the defendants that this was
13 a great winning program and nobody wanted to rock the boat so
14 nobody really cared what was going on, which is exactly the
15 role that Mr. Doody was in.

16 I don't think there is a question that there was a legal
17 duty, obligation that was owed under *Gambrell* by the athletic
18 director, as defined by his role, to manage and implement. The
19 Board and the County want to talk about their robust policies,
20 and you heard a lot about what it is to involve the policy
21 student to student, but what you haven't heard, and what we are
22 going to elucidate, is the information about what was done to
23 the employees, the administrators, the coaches when they didn't
24 follow the policies.

25 And that's what we are talking about here is we are not

1 talking about explaining this to the students. The students
2 aren't responsible. It's the adults. And it is disputed --
3 and we are at that motion for summary judgment where we take
4 the facts most favorable to us and the inferences therefrom --
5 it's disputed -- Mr. Doody contends he didn't breach any
6 standard of care. It's disputed by the coaches. Wallich
7 testified that he was never told by Doody about any need for a
8 supervision plan, and none was created. That's Exhibit 23,
9 Wallich deposition, 351 to 352.

10 Likewise, Coach Colbert testified that he was never
11 informed about a supervision in the locker room plan. That's
12 Colbert's deposition at 368-69. I think he goes on to say in
13 his deposition, Colbert, that is, that, well, if I had been
14 told about one, I would have followed that plan. That is the
15 athletic director's responsibility, to implement the policies
16 that are promulgated by both the Board, that are disseminated
17 by the system-wide athletic director. It is his responsibility
18 and the principal's responsibility to implement those policies.
19 You can have all the robust policies you want, but unless there
20 is actual implementation...

21 And why is this complete indifference? Doody breached
22 his standard of care in ensuring the supervision even after he
23 knew the coaches weren't supervising in 2018. He didn't have a
24 plan. In his deposition: I didn't have a plan. I am not sure
25 if there was a plan or if the coaches did that. I just let

1 them do whatever they were going to do.

2 The Board of Education, through its designee,
3 Mr. Sullivan, states that Doody was required to have a plan in
4 place, and I think the Court heard some of his deposition
5 before, and that's his deposition, Mr. Sullivan, at page 96.
6 And, again, it's uncontested that no plan ever existed or was
7 created.

8 The internal investigation that was conducted by the
9 school system and was attached both to our pleadings as Exhibit
10 46, as well as defendants' motion for summary judgment,
11 provides further evidence of the chronic lack of supervision.
12 And we are not talking about simple horseplay. We are not just
13 talking about vandalism. A chronic lack of supervision and
14 Doody's complete and utter indifference to those actions.

15 Judith Baggett-Stone, a teacher at the school, complained
16 to Doody multiple times about the lack of supervision to him.
17 They are unsupervised. Something is going on. They need to be
18 down here. And two -- at least one time -- Mr. Doody admits to
19 two times -- at least one time, he had to go down and
20 personally supervise.

21 Mr. Hancock, who was the operation -- at the operations
22 meeting -- this is the team meeting of school administrators,
23 including Mr. Doody and the principal in 2017 and 2018 -- who
24 is the director of supervision and security, states that he
25 repeatedly expressed security and supervision concerns in those

1 operation meetings with both Crouse and Doody, and that they
2 were unsupervised before athletic practice, and he didn't feel
3 that he was being taken seriously. This is the school security
4 officer.

5 The assistant principal, Maniya Jules, expressed her
6 concern when she received complaints from staff and other
7 referrals regarding students about a lack of supervision in the
8 JV football team, which she reported to Doody, but was ignored.
9 Doody ignored them.

10 Ken Howard, the building services worker -- so this
11 wasn't one isolated complaint, one isolated incident. This
12 was -- and this wasn't just somebody leaving trash on the
13 ground or knocking something over. This is what was going on
14 in the locker room that Mr. Doody was aware of, and keep in
15 mind he has responsibilities for the administration of these
16 programs and primarily the safety of the students who
17 participate in those programs.

18 In the shower -- directly from -- this is directly from
19 his deposition, that is, the Howard deposition -- In the
20 shower, the waterproof ceiling tile had been knocked down and
21 cracked all over the floor. Benches ripped up off the pedestal
22 and out from the floor. Ceiling tiles in the main locker room
23 are gone, missing. The lockers, itself -- the doors on the
24 lockers, itself, smashed in, twisted. Can't close them. Can't
25 open them. The locks, the handles, the lockers had been broken

1 off. Can't open the door. In the bathrooms, the stall panel
2 is ripped off, toilets jammed.

3 THE COURT: Wind up with a couple more minutes, if
4 you would.

5 MR. DeGONIA: I'm sorry, Your Honor.

6 So the fact is they knew not just about that. Mr. Doody
7 had taken the training, the National High School training, and
8 he was required to ensure that his coaches had taken that
9 training. He took that training. In that training, it gives a
10 specific example -- this is a New Mexico case -- of young men
11 being sodomized when they were left unsupervised.

12 He received a directive, completely failed to implement
13 that, and, more importantly, ensure that any of his coaches had
14 taken that training and had completed it. And, in fact, the
15 school's own internal investigation goes on to say that he
16 completely failed in fulfilling that duty.

17 And just a couple of other points I want to make, Your
18 Honor.

19 He was also aware that one player in particular, J.C.A.,
20 was a danger to his fellow students. Now, the County points
21 out and Mr. Doody points out the *Stracke* case, as well as
22 others, but in those cases, some action was taken, and it may
23 have fallen short, but in this case, Mr. Doody received these
24 things and did nothing about it.

25 Likewise, he denies, that is, Mr. Doody denies any

1 knowledge of this prior event in 2017, which, upon questioning,
2 Ms. Crouse says, Well, maybe he was there; maybe he wasn't.

3 Oh, now that you mention it, I do remember that he was at that
4 meeting where a prior, very specific --

5 THE COURT: Who is Ms. Crouse? I'm sorry.

6 MR. DeGONIA: The principal, Your Honor.

7 THE COURT: Oh, I'm sorry. I was thinking of
8 somebody else.

9 MR. DeGONIA: She was present at the meeting,
10 Mr. Doody was present at the meeting when this prior event --
11 this is prior to the October 31st event -- was discussed,
12 specifically brought up an allegation about brooming in the
13 locker room a year prior.

14 Dr. Scriven, who worked in the central office, was there,
15 and his recollection was much more clear that Mr. Doody was
16 there. So not only did he have notice --

17 THE COURT: Does Doody deny that he was there?

18 MR. DeGONIA: Doody denies -- he denies any knowledge
19 of any prior allegations of sexual assault in a locker room,
20 let alone assaults. There is -- the record is replete with the
21 level of -- I mean, it was a veritable "Lord of the Flies" in
22 this locker room that he completely ignored, and the -- and
23 treaties from multiple staff, administrators to him to take
24 some action, to which Maniya Jules, in her deposition,
25 responds, Well, when you asked to increase the supervision,

1 were you given an explanation for why it wasn't done?, and she
2 was given no explanation by Mr. Doody as to why it wasn't done.

3 THE COURT: You need to wind up.

4 MR. DeGONIA: I will, Your Honor.

5 It is not often that you are in a situation where you can
6 hear from someone as to what your complete and utter disregard,
7 your complete indifference to the safety is.

8 In this particular case with this particular defendant,
9 you actually know that he was completely indifferent to it, and
10 we know that he was completely indifferent at the time and even
11 afterwards because after this rape occurs, these rapes occur in
12 the locker room on October 31st, one of his duties, one of his
13 responsibilities is to perform an evaluation on the coaches and
14 their performance. It's weeks after the event, the rape has
15 occurred, and he is required to fill out a form that rates
16 satisfactory, unsatisfactory performance. And on Mr. Colbert,
17 who was not in the -- in the room, didn't perform his duties,
18 didn't perform the training -- the record is replete with
19 omissions by Mr. Doody about completing that -- he checks the
20 box and says that Frank -- Mr. Colbert's supervision on that
21 day was satisfactory.

22 THE COURT: I need you to -- I'm sorry.

23 MR. DeGONIA: And, so, if that doesn't tell us that
24 this is gross and wanton and reckless indifference, I don't
25 know what does, Your Honor.

1 THE COURT: All right. Mr. Ruff, briefly.

2 MR. RUFF: I will try to be very brief.

3 There was argument that there, as to the August 2017
4 incident, that there was no reason that Mr. Doody knew that the
5 locker room was unsupervised. Absolutely there was reason for
6 him to know because that was his job. That was his charge as
7 the athletic director: to monitor, observe, ensure that
8 supervision was occurring so that both sexual and -- and/or
9 physical assaults would not occur to the students at Damascus
10 High School.

11 There was talk about the fact that, you know, okay, maybe
12 they didn't get this training, but they got enough training.
13 Mandatory is mandatory. And Mr. Doody did not ensure that his
14 staff members who were supposed to be ensuring the safety of
15 these young men, Doe Plaintiff No. 1 specifically in this case,
16 was being -- other students around him were being supervised
17 along with him.

18 And so if they took the training or if they didn't take
19 the bullying and hazing training, they either had notice of the
20 -- the possible harms that were going to happen if they didn't
21 follow the policy, or they should have known what the -- what
22 was going to happen, and with deliberate indifference, they
23 didn't care to do what they were -- what they were charged to
24 do, what they were required to do.

25 And Mr. Doody thoughtlessly disregarded his obligation,

1 disregarding the consequences to the young men that he had
2 under his stead, and did nothing. Right? He did not make sure
3 that Mr. Wallich was supervising. In fact, Mr. Wallich
4 testified, the varsity coach testified that he thought it was
5 his duty only to supervise the varsity and that it wasn't a
6 problem for him -- and this is after the August 1st. I will go
7 back to August 1st.

8 But as far as Mr. Doody is concerned, he was in charge of
9 the athletic program. It is clear that when Doe Plaintiff No.
10 1 was assaulted, sexually assaulted in the locker room, there
11 was no supervision being conducted. And despite the trainings
12 that put these coaches and Mr. Doody on notice, he did not do
13 his job. He thoughtlessly disregarded his job. And contrary
14 to Defendant Sullivan's testimony, he was under the impression
15 that coaches -- again, I said this earlier -- didn't even have
16 to be in compliance with the trainings that were mandatory by
17 the system in order to remain in action.

18 He had coaches that were not even sanctioned by the
19 system looking over these young men, and it is no coincidence
20 that this is the result that comes. So, certainly, even as to
21 the August 1st -- excuse me, August 1st, now I am espousing it
22 -- the August 2017 incident, there was gross negligence, at
23 least a genuine dispute of material fact as to Mr. Doody.

24 THE COURT: Let's go on to Count Five, gross
25 negligence against Mr. Wallich, who is the head -- the head

1 football coach.

2 MS. KANE: Thank you, Your Honor.

3 On behalf of Mr. Wallich, we would incorporate first the
4 arguments that were made on Count One in the negligence count.
5 And as the Court knows, he was the varsity coach. It's clear
6 that -- I just want to make sure the Court understands that
7 Mr. DeGonia, in the prior argument, was referencing what
8 happened as a result of Does 2, 3, and 4, the second incident,
9 and that was the focus of his argument, versus Mr. Ruff was
10 dealing with Doe 1. Our motion as to Coach Wallich is just as
11 to Doe 1.

12 THE COURT: Okay. Very good.

13 MS. KANE: Okay?

14 THE COURT: I understand. I understand.

15 MS. KANE: With respect to Doe 1 and August 1st,
16 2017, at or prior to that time, again, no evidence that Coach
17 Wallich had seen, been told, heard, knew anything about hazing,
18 sexual assault, assault in the locker room. Doe 1's incident
19 was preseason. School had not even started. Doe 1's dad
20 dropped him off right before practice. He was getting dressed
21 when the criminal assault happened.

22 There is no evidence of what Coach Wallich did on that
23 day that rose to a level of an utter disregard for the safety
24 of his students. What happened to Doe 1 is -- was not
25 foreseeable. It was a criminal sexual assault.

1 So for those reasons, the evidence does not meet the high
2 standard required for an utter and reckless disregard for the
3 safety of others, and, therefore, summary judgment is
4 appropriate for Coach Wallich.

5 THE COURT: All right. Mr. Ruff again.

6 MR. RUFF: The Court's indulgence, Your Honor. I
7 just need to find one piece.

8 I strongly disagree that the assault -- the sexual
9 assault that happened to Doe Plaintiff No. 1 in August of 2017
10 was not foreseeable. As we have already mentioned, there are
11 policies in place for a reason: to prevent the very harm that
12 occurred. So Coach Wallich either knew or should have known
13 that, based on the supervision policy to supervise at all
14 times, which is very clear, at least a genuine dispute of
15 material fact that there was no supervision occurring while Doe
16 Plaintiff No. 1 was being assaulted, that he did not meet his
17 duty. He disregarded that duty. There is evidence that
18 afterwards -- which would allow a reasonable juror to infer
19 that this supervision -- this lack of supervision was an
20 ongoing, continuous occurrence that went from the '17 incident
21 all the way through October of 2018.

22 We talked about some of the staff members who complained
23 about the lack of supervision. Mr. Ken Howard, I believe -- I
24 don't know if you quoted the year -- but he stated that he had
25 been complaining to the Damascus -- he had been complaining to

1 his supervisor about the lack of supervision in the JV locker
2 room twice a month for 13 years. So there was a clear
3 directive, there was a clear duty, and clearly, as to Doe
4 Plaintiff No. 1, in August of 2017, that duty was disregarded,
5 and the evidence that follows that backs it up and solidifies
6 that Coach Wallich was -- was supposed to be providing
7 supervision.

8 He testified that he had never been advised of his
9 obligation by his supervisors that he was required to ensure
10 supervision of the JV team, just the varsity team. He knew or
11 should have known that failing to ensure the supervision would
12 create a risk of unreasonable harm, yet, he thoughtlessly
13 failed to act upon that duty.

14 And with all the inferences in the favor of Plaintiff Doe
15 1, this motion for summary judgment should be denied.

16 THE COURT: Let me ask you a question. I don't know
17 whether the record gets into this or not, but often in athletic
18 locker rooms, the athletic coach, athletic director have
19 offices that are pertinent to that.

20 Is anything in the record about where these defendants
21 were physically located relative to the locker room?

22 MR. RUFF: Yes, Your Honor. The defendants were
23 actually kind enough to let us visit the locker room, and so we
24 have been able to see that Coach Wallich's office was probably
25 -- if I was in his office, the JV locker room would just be on

1 the other side of the wall behind you.

2 THE COURT: So you are saying about 15, 20 feet?

3 MR. RUFF: I'd say maybe 25.

4 THE COURT: All right.

5 MR. RUFF: So, yeah, in earshot, nearby, able to
6 provide reasonable assistance, able to understand if there was
7 a -- a -- something going on, able know what was going on. But
8 based on what my client said happened to him, and, you know, I
9 don't want to belabor this point, but this was not seconds.

10 Right? This was a sexual assault.

11 THE COURT: You are talking about Wallich's office is
12 close by there? Is that who we were just talking about?
13 Wallich's office was close by?

14 MR. RUFF: Wallich's office was within the actual
15 locker room. So the makeup of the locker room --

16 THE COURT: Who is 25 feet away? Was that Wallich or
17 somebody else?

18 MR. RUFF: His office was no more than 25, 30 feet
19 away from the JV locker room, which had its own room. So there
20 is a door. You got to go into the JV locker room. You can
21 come in and out. So there is a window that you can see, but
22 you can hear if you were in Coach Wallich's office, I think,
23 from when I remember visiting the locker room. But at the end
24 of the day, there was no way that Coach Wallich was in his
25 office while this young man was being rammed in the anus.

1 THE COURT: Let me put the question this way as well:
2 I assume what's happening with regard to all these incidents is
3 that they are before the school year opens, football team
4 practicing. Were there hours that the players were supposed to
5 arrive for the training?

6 MR. RUFF: So this was in between two -- so you have
7 got the morning practice and the afternoon practice.

8 THE COURT: What time in the morning are they
9 supposed to arrive?

10 MR. RUFF: I couldn't be accurate, but I would
11 assume, if I am remembering when I played, you know, 8 or 9:00
12 at the latest. So this was midday before the afternoon
13 practice.

14 THE COURT: The assumption being that, presumably,
15 there would be a coach on site at that time?

16 MR. RUFF: It's not just the presumption, Your Honor.
17 That was the policy. Right? It was supposed to be clear to
18 everyone, and either Coach Wallich knew or he should have
19 known, but what he said was he halfway knew. He knew he was
20 supposed to supervise the varsity, but he threw his hands up
21 when it came to the JV.

22 Well, the JV coach, and I can kind of incorporate my
23 argument as to Mr. Colbert, you know, he said in his
24 deposition, Well, Mr. Wallich was in charge of the whole
25 program, so, you know, it was his thing, you know? So a lot of

1 the finger pointing in this case I think is going to continue.

2 And, furthermore, there is testimony from at least ten
3 players, I think five in '17, and others, including our
4 clients, over -- between August 1st -- excuse me, August of '17
5 until the October 31st incident who eventually testified in
6 this case that they had been victims of brooming in the JV
7 locker room. This is a course of conduct. This was extremely
8 gross negligence.

9 THE COURT: Sorry to push you along. We are trying
10 to keep within a timeline. I have enough. Thank you very
11 much, Mr. Ruff.

12 Let's go on to Mr. Colbert. Ms. Kane again.

13 MS. KANE: Your Honor, with respect to Mr. Colbert,
14 he was the JV coach.

15 And I would mention just very briefly that Mr. Ruff's
16 last reference to incidents after August 1, 2017, again, he's
17 talking about things that happened after Doe 1's incident,
18 nothing prior.

19 With respect to Mr. Colbert, there is no evidence that he
20 knew of any assault, sexual assault, hazing in the locker room
21 at any time. There were no prior complaints about the
22 supervision. Again, those complaints that had been mentioned
23 were with respect to the second incident. We need to confine
24 the record to Doe 1, on the negligence and gross negligence
25 counts, to what had happened on or prior to August 1, 2017, and

1 there is nothing. There is no indication, there is no
2 evidence, there is no fact from which a Court could find that
3 there was an utter disregard for the safety of the student
4 through Mr. Colbert at that time.

5 Again, we don't know how long that locker room -- when
6 Mr. Doe 1's assault occurred, we don't know how many seconds or
7 minutes it had been since an adult was in that locker room. We
8 know it was preseason. We don't know the exact time. It's not
9 in the exact record.

10 THE COURT: Let me ask you a question, though. At
11 some point -- and these incidents all occurred on the junior
12 varsity, didn't they?

13 MR. MALONEY: Correct.

14 THE COURT: They were not varsity players?

15 MS. KANE: Yes.

16 THE COURT: But at some point, the players are on the
17 field. Right? They are practicing. At another point, they
18 are getting ready to practice and they are in the locker room,
19 and at the end of the practice, they are back in the locker
20 room or for the break. Right?

21 So would it not be a plausible argument to say that in
22 those key times when they are back in the locker room, that's
23 when the supervision is needed? I mean, this is not a case
24 about somebody being injured on the field who wasn't being
25 supervised. There are supposedly key, potentially hot areas

1 that would require supervision.

2 Would that not be a plausible argument here, that if
3 there wasn't somebody there pretty much all the time in those
4 two key segments, you have got potentially a negligent, or,
5 arguably, a grossly negligent action?

6 MS. KANE: Well, Your Honor, I think that you have to
7 look at the facts of each particular time. And one thing
8 that's important is notice, and has there been any issue, has
9 there been any problem? And the coaches have an obligation for
10 supervision of the students on and off the field before and
11 after practice.

12 This was, again, Doe 1, preseason, right before practice
13 is what I read in the record, and he was getting dressed in the
14 locker room when this unforeseeable criminal assault occurred.

15 What the Court is asking about doesn't go to an utter and
16 reckless disregard for the safety of students. If anything,
17 it's a negligence question the Court asks, but there is
18 certainly -- I think with respect to the alleged breach of the
19 duty of reasonable care and the utter and willful disregard,
20 you have to look at the landscape and what was known at the
21 time. What had the experience been of those that were involved
22 with the program? And there had been no prior incidents,
23 nothing to put them on notice that they -- there was a problem
24 with the way that things were being done. We don't know
25 anything prior to August 1, 2017.

1 So, in answer to the Court's question, I don't think that
2 would go to an utter and reckless disregard for the safety of
3 students.

4 THE COURT: All right.

5 MS. KANE: People would be within earshot and in and
6 out was the way that the program was directed to work.

7 THE COURT: Okay. Mr. Ruff.

8 MR. RUFF: Your Honor, what we do know before August
9 of 2017 was there was a policy, there was training that was
10 required. And when we talk about what's reasonably
11 foreseeable, we are talking about --

12 THE COURT: Do we know that Wallich did not do -- is
13 there evidence that he did not do the training?

14 MR. RUFF: That's the point I was making earlier,
15 Your Honor, is that if he did it or if he didn't do it, either
16 he had notice that this was a, you know, a likely result of
17 lack of supervision, or if he didn't take the training, he was
18 completely absolving his duty to even be informed, and he
19 should have known. So I think it's, again, another red herring
20 to argue that Coach Wallich took the training or not.

21 What I remember is that there was evidence in the record
22 from at least I believe -- I am not even going to try and quote
23 who it was, but I believe that there is evidence in the record
24 that Coach Wallich didn't take the training.

25 But let's assume he took the training. That means he was

1 advised: No supervision of students, that could lead to
2 sodomization of your players. And when we talk about what's
3 reasonably foreseeable, we talk about foreseeability exists
4 where the actual harm falls within a general field of danger.
5 It's not required that he knew that this particular player was
6 going to be sodomized by these particular players.

7 What he knew was that it was likely that if he didn't do
8 his job, that very bad things, like what was in the example of
9 this training, could very well occur. He thoughtlessly
10 disregarded that to the detriment of these people's children.
11 And it's disingenuous to say that there was no notice simply
12 because -- are we supposed to wait for someone to be raped in
13 order for a school system to have the responsibility to stop
14 the next one?

15 THE COURT: All right. Understood. Anything
16 further?

17 All right. We are a little behind time, but not much.
18 So it's ten of one. Let's reconvene at -- what are you telling
19 me? We will break now for an hour, from ten of one to ten of
20 two, and we will start at that time.

21 Thank you, folks.

22 (Recess taken from 12:50 p.m. until 1:59 p.m.)

23 THE COURT: Be seated.

24 All right. We are, I think, at Title -- sorry, at Count
25 Seven, which is Title IX, and Ms. Kane, you are up first.

1 MS. KANE: Thank you, Your Honor.

2 With respect to Count Seven, the Title IX count, I'd like
3 to begin argument with the damages allegation. Damages -- and
4 this law will apply equally to Doe 1 and to Does 2, 3, and 4,
5 so in both motions. All plaintiffs have pled in paragraph 227
6 of the second amended complaint, although it's couched in the
7 terms of the minor plaintiff and it talks about Doe 4, they
8 have all argued that -- seem to argue that it applies to them.

9 With respect to the relief sought, they seek monetary
10 damages, punitive damages, injunctive relief. And there is
11 important Supreme Court law which indicates that there --
12 punitive damages are not available under Title IX, and neither
13 are emotional distress damages and neither are the injunctive
14 relief damages based on the factual record before the Court.

15 I am going to take them one at a time -- sorry --
16 starting with punitive damages. Summary judgment must be
17 granted to the extent that the plaintiffs seek punitive damages
18 because they are not recoverable. Title IX is one of four
19 anti-discrimination legislation birthed out of the spending
20 clause. The federal government grants funding to the recipient
21 conditioned on certain anti-discrimination behavior of the
22 funding recipient.

23 So the four statutes that are considered as spending
24 clause legislation that have anti-discrimination goals are
25 Title VI of the Civil Rights Act, the Vocational Rehabilitation

1 Act, Title IX, and the Affordable Care Act. Congress has the
2 power to dictate the terms with which the federal funds
3 recipients must comply, but these obligations must be clearly
4 stated and unambiguous so that a recipient has notice of its
5 obligations before accepting the federal funding.

6 The Supreme Court has regularly applied a contract law
7 analogy in trying to determine the scope of conduct for which a
8 funding recipient may be held liable in a private lawsuit
9 seeking money damages based on alleged violation of the
10 anti-discrimination statute.

11 So under *Barnes*, which is in our binder and cited in the
12 pleadings, the Supreme Court has held that punitive damages
13 cannot be awarded in a private action against a municipality
14 for discrimination under the ADA or the Rehabilitation Act, two
15 of the four acts that I have previously mentioned.

16 The plaintiff in *Barnes* was a paraplegic who had suffered
17 serious injuries when he was arrested and transported in a
18 police van and -- that did not have the accommodations for his
19 disability. He brought his ADA and Rehab Act claims for
20 discrimination. The jury awarded compensatory and punitive
21 damages. The district court vacated the award for punitive
22 damages. The Eighth Circuit reversed, and the Eighth Circuit
23 reversed because they said that punitive damages were an
24 integral part of the common law, and that Congress had done
25 nothing to disturb the tradition and prevent the award of

1 punitive damages.

2 It went to the Supreme Court -- wait. Before we get to
3 the Supreme Court, the Eighth Circuit had been relying on the,
4 quote, *Franklin* general rule. And I mention that only because
5 plaintiffs have relied on the, quote, *Franklin* general rule in
6 this case, and that said -- the *Franklin* general rule said,
7 Absent clear direction to the contrary by Congress, the federal
8 courts have the power to award any appropriate relief in a
9 cognizable cause of action brought pursuant to a federal
10 statute.

11 Well, the Supreme Court reversed and overruled the
12 *Franklin* rule and held the following: The Supreme Court found
13 that remedies which are coextensive with those -- it -- it used
14 a contract law framework, and said that the spending clause
15 legislation, under all four of these acts, although the case
16 there was focused on Voc. Rehab and ADA, it said that -- or the
17 Rehabilitation Act and the ADA, it said that, Like Title VI --
18 Title VI, like other spending clause legislation, is in the
19 nature of a contract. Punitive damages are generally not
20 available for breach of contract, nor could an implied punitive
21 damages provision reasonably be found in Title VI.

22 Punitive damages may not be awarded in private suits
23 brought under Section 202 of the ADA and 504 of the
24 Rehabilitation Act. Remedies for those are consistent with
25 Title VI of the Civil Rights Act. A remedy is appropriate

1 relief only if the recipient is on notice that by accepting the
2 federal funds, it exposes itself to that liability.

3 Title VI mentions no remedies, and punitive damages are
4 generally not available for breach of contract, nor could it be
5 said that Title VI funding recipients have merely, by accepting
6 funds, implicitly consented to the indeterminant magnitude of
7 which could produce liability exceeding the level of federal
8 funding. Because punitive damages may not be awarded in
9 private suits under Title VI, the Supreme Court said, it
10 follows that they may not be awarded in suits under Section 202
11 of the ADA and Section 504 of the Rehab Act.

12 The Fourth Circuit, in *Mercer v. Duke*, interpreted this
13 in *Barnes* because it's spending clause legislation. They
14 applied the punitive damages argument -- ruling under *Barnes* to
15 Title IX in *Mercer v. Duke*. And in *Mercer v. Duke*, that was a
16 female kicker on a football team at Duke, and she had a Title
17 IX discrimination suit against Duke. At trial, the jury
18 returned a verdict in favor of Mercer. The jury awarded her
19 one dollar in compensatory damages and two million in
20 punitives.

21 The Fourth Circuit had the case on appeal, and the Fourth
22 Circuit wrote, Duke appealed, arguing, *inter alia*, that
23 punitive damages were not available under Title IX. We held
24 the appeal in abeyance pending the Supreme Court's decision in
25 *Barnes v. Gorman*. In *Barnes*, the Supreme Court held that

1 punitive damages are not available for private actions brought
2 under Title VI. Because Title IX is interpreted consistently
3 with Title VI, the Supreme Court's decision in *Barnes* compelled
4 us to vacate Mercer's punitive damages award.

5 So for those reasons, punitive damages are not available
6 to Does 1, 2, 3, or 4, and summary judgment should be granted.

7 The next case is *Cummings*. *Cummings* holds -- it's a very
8 recent Supreme Court case, 2022 -- *Cummings* holds that
9 plaintiffs cannot recover emotional distress damages under
10 Title IX and relies very heavily on the same arguments that
11 were made in *Barnes*.

12 In *Cummings*, the plaintiff, who was deaf and legally
13 blind, requested a sign language interpreter during her
14 physical therapy appointments, and the defendant refused.
15 Plaintiff sued under the anti-discrimination provisions of the
16 Rehabilitation Act and the Affordable Care Act seeking damages
17 for her humiliation, frustration, emotional distress. The
18 district court dismissed on the ground that emotional distress
19 damages were not available. The Fifth Circuit affirmed. The
20 Supreme Court granted cert. to determine whether emotional
21 damages could be recovered in a private action arising out of
22 the spending clause. Relying on *Barnes*, the Court said they
23 could not.

24 The Court reasoned that spending clause legislation
25 operates based on consent, and the available remedies analysis

1 turns on whether the recipient had notice of what sort of
2 penalties might be on the table in return for accepting the
3 relevant finding.

4 The Supreme Court presumed a funding recipient is aware
5 that for breaching its spending clause contract with the
6 federal government, it will be subject to the usual contract
7 remedies in private suit.

8 And then the Supreme Court wrote, Because it is hornbook
9 law that emotional distress is generally not compensable in
10 contract, the Court concluded that, quote, we, therefore,
11 cannot treat federal funding recipients as having consented to
12 be subject to damages for emotional distress. It follows that
13 such damages are not recoverable under the spending clause
14 statutes we consider here.

15 So based on *Cummings*, Your Honor, and that has been --
16 recently, in the *Doe v. Fairfax* Fourth Circuit case in a ruling
17 on the motion in limine to exclude evidence of emotional
18 distress damages, the Eastern District of Virginia wrote,
19 Having reviewed *Cummings* and its progeny, the Court finds that
20 its holding cannot be distinguished and applies to claims
21 brought under Title IX as an anti-discrimination spending
22 clause statute, and the plaintiff in the *Doe v. Fairfax* has
23 been precluded from seeking emotional distress damages in that
24 case. And that was a case that has been cited by the parties.
25 It's back on remand. And while it was on remand, the *Cummings*

1 case came out, and the ruling on emotional distress damages was
2 sought and obtained.

3 Other district courts have consistently applied *Cummings*,
4 and we cited to *Doe v. Liberty*. There was another one, *Doe v.*
5 *Moravian College*, where -- I believe it's in our binder --
6 where the plaintiff was sexually assaulted and sued under Title
7 IX. They applied the contract law analogy and looked at *Barnes*
8 and *Cummings*, and said, in her second amended complaint, she
9 had only listed damages for emotional distress, so summary
10 judgment was granted in her favor.

11 Plaintiffs cited to *Doe v. Purdue* and said that emotional
12 distress damages could be allowed, that *Cummings* was under the
13 Rehab Act, which we know that the Fourth Circuit said, in
14 *Mercer v. Duke*, even though *Barnes* was not under Title IX, it
15 was spending clause legislation, and, therefore, it applied to
16 Title IX, so the Fourth Circuit would do the same thing here.

17 And *Purdue*, interestingly enough, cited by the
18 plaintiffs, was researched, and, apparently, they changed their
19 opinion because, in the record, there is a final jury
20 instruction which -- with respect to emotional damages, which
21 was docketed on 9/23/22, which includes this sentence: You are
22 not permitted to award damages against Defendant Purdue
23 University for any emotional harm that Plaintiff Hayes asserts.

24 THE COURT: Let me stop you for a moment, and let's
25 think down the road about how this case gets tried to a jury.

1 In the end, there is only going to be one verdict. Correct?
2 No defendant, I think we have in mind, is going to be assessed
3 more or less than any other defendant. If there is liability
4 on one theory or another -- leave aside punitive damages for a
5 moment -- there is still going to be compensation for monetary
6 damages. Correct?

7 MS. KANE: Well, Your Honor, that's a very good
8 question, and I think that based on the status of the law,
9 there would have to be a special verdict form.

10 THE COURT: Oh, sure. I am with you on that. But
11 allow that there is a special verdict as to each count, each
12 defendant, do you find them liable? You go down that list.
13 Then you get to really at the end, and there may be more than
14 one possible item here, but, basically, you are going to get
15 one judgment in the end per plaintiff for compensation -- for
16 compensation, monetary damages. Would you accept that?

17 Medical damages, for example, medical expenses or whatever.

18 MS. KANE: Your Honor, I think it's premature to make
19 that determination at this moment in time. I think that we
20 have certainly multiple theories brought by the plaintiffs:
21 negligence, gross negligence, Title IX, and 1983.

22 THE COURT: No. I am not talking about punitive or
23 anything else. The damage component for the, at least the
24 impact, you are not arguing that *Cummings* doesn't allow any
25 recovery, are you? You are saying for emotional damages?

1 MS. KANE: For emotional distress damages. There
2 could be a loss of an educational opportunity --

3 THE COURT: Well, leave that aside for a moment,
4 though. There is an impact at the time, there is a degradation
5 at the time of the incident which presumably would be
6 compensable? Maybe not in future, but beyond that, that
7 component would be compensable. Right?

8 When you write down in a, at least according to a State
9 of Maryland form what the damages are, you put down the
10 compensatory number, and then usually pain and suffering, which
11 I think we agree means emotional damages, is a separate
12 component.

13 And in the end, I am saying it seems to me that if there
14 is a -- if the -- a given plaintiff prevails on an issue
15 against -- a count against any one defendant, there is still
16 only one number that they are entitled to at the end even if
17 it's joint and several.

18 Do you disagree with that proposition?

19 MS. KANE: Typically, Your Honor, there would be one
20 number for damages. However -- and in this case, we have --
21 the damages that have been claimed by the plaintiffs are
22 emotional distress damages, with the exception, really, of Doe
23 4, who also has a private school expense, a loss of an
24 educational opportunity. The others' emotional distress
25 damages, if they -- since that's all that's been pled and

1 claimed, this could dispose of their Title IX claim.

2 THE COURT: I see your point, and I assume I will
3 hear an answer on this, about whether the impact alone is
4 compensable, the degradation alone, as opposed to the suffering
5 that -- in consequence of that. I leave that for future
6 argument.

7 What I am really getting to, though, is the issue of
8 emotional damages would be compensable under a negligence or
9 gross negligence theory, wouldn't it? That's not precluded
10 under those common law theories?

11 MS. KANE: Well, you know, no. No. They couldn't --

12 THE COURT: They aren't?

13 MS. KANE: -- claim their emotional distress damages
14 under negligence or 1983 or gross negligence to the extent --

15 THE COURT: Negligence, gross negligence, 1983?

16 MS. KANE: Yes.

17 THE COURT: Emotional -- and, presumably, the
18 emotional damages are the same. Right? I mean, you are not
19 going to get different numbers for any one plaintiff against
20 one or more defendant. There is still going to be a single
21 number for emotional damages where it's allowable, assuming
22 it's not allowable under Title IX. Right?

23 MS. KANE: Right. But the record -- from the defense
24 perspective, Your Honor, the record needs to be protected as to
25 which counts they are allowed and which counts they aren't.

1 And the -- and with respect to granting the motion on emotional
2 distress and punitive damages, it disposes of that element.

3 THE COURT: We are not talking about punitive
4 damages. I am not talking about that right now. I am talking
5 about emotional damages. What I am thinking is -- I am looking
6 at the verdict sheet right now, and I see emotional damages,
7 one number per plaintiff. Now, it's going -- it may come in if
8 they prevail on negligence, gross negligence, 1983, and maybe
9 it doesn't come in on Title IX, but as far as the computation,
10 the consideration, it's still in the case one way or another,
11 right, if they prevail?

12 MS. KANE: It's in the case, Your Honor, but it could
13 have an impact on payment.

14 THE COURT: On what?

15 MS. KANE: Payment.

16 THE COURT: On payment. Well, maybe you can get to
17 that at some point. I am not quite sure what that is. Board
18 of Education is a defendant in these other counts, is it not?
19 And if you -- if you don't -- with regard to negligence, gross
20 negligence, and 1983, any one of the three, if you are -- the
21 Board of Education is a defendant, is it not?

22 MS. KANE: Not in 1983, Your Honor, because the Board
23 of Education is a state entity. It's not a person for --

24 THE COURT: Leave that aside. Let me go back just to
25 the negligence and gross negligence counts. They are

1 defendants?

2 MS. KANE: Yes.

3 THE COURT: Emotional damages could be proved --

4 MS. KANE: No, not in gross negligence. There is no
5 gross negligence claim against the Board of Ed. Only
6 negligence.

7 THE COURT: Stay with negligence for a moment.

8 Emotional damages are compensable there, are they not?

9 MS. KANE: Yes.

10 THE COURT: And they would be the same wherever they
11 might appear; isn't that correct? You are not going to get
12 different emotional damages under negligence versus, let's say,
13 Title IX if I disagree with you? It's still the same
14 component, isn't it?

15 MS. KANE: It's the same component, Your Honor, that
16 there would be one amount of emotional distress damages
17 whatever the legal theory may be, but with respect to what the
18 legal theory may be, it impacts on whether or not they can
19 recover that amount.

20 THE COURT: I am not sure what you are saying. If
21 you get emotional damages under negligence, what is it that
22 blocks recovery for emotional damages if the Board is liable?

23 MS. KANE: There may be limits for liability, Your
24 Honor, with respect to some of the other claims.

25 THE COURT: But there would be no limits under Title

1 IX? You will have to look at that.

2 MS. KANE: Yes.

3 THE COURT: Well, I wonder. I haven't heard that.

4 It's possible, but -- okay.

5 MS. KANE: So the motion should properly be granted
6 so there is not -- that issue does not arise.

7 THE COURT: Well, perhaps I will hear the response on
8 that. All right. Go ahead. I was just trying to see how you
9 would frame this, though, on the special verdict sheet. But I
10 wanted to be clear that there is certainly emotional damages
11 that are compensable under at least one count, maybe two?

12 MS. KANE: Yeah, one amount, and they can recover
13 them under their other counts, but if they are not available
14 under Title IX, then summary judgment should be granted. And
15 the Supreme Court has said --

16 THE COURT: So summary judgment, but for what I am
17 talking about, the impact itself, the event of the -- this is
18 something I don't know that *Cummings* gets into -- there is an
19 impact at the very moment that the assault occurs. There is
20 sequelae, emotional and otherwise, afterwards, but there is an
21 un-permitted touching. It's like the basic law school
22 question: Do you get something? Do you get a dollar? You get
23 something for that, don't you? I mean, it could be nominal.
24 It could be more than nominal. Not for the emotional
25 component.

1 And if you broke it out, and this -- well, I am not going
2 to argue plaintiffs' case for them, but that's just sort of
3 speculating a bit on how you would deal with that.

4 But go ahead, finish your argument. I have had that
5 thought in my mind, and perhaps I will hear from Mr. Maloney
6 and Mr. Ruff on that later.

7 MS. KANE: Your Honor, for the reasons stated, we
8 would request that the Court enter summary judgment pursuant to
9 *Barnes and Cummings* and the other district court -- and cases
10 that have heard and agreed with followed comments.

11 THE COURT: And you mentioned injunctive relief. Are
12 the plaintiffs seeking injunctive relief of any sort here?

13 MR. MALONEY: We are.

14 MS. KANE: Your Honor --

15 THE COURT: Did you argue that that's not available
16 either? Have you argued that injunctive relief is not --

17 MS. KANE: No. There is no standing for injunctive
18 relief here, Your Honor, absent any showing of any real or
19 immediate threat that the plaintiffs will be wronged again.
20 They have all graduated from Montgomery County Public High
21 School. The individuals are not in the same positions anymore
22 with respect to Crouse, Wallich, Colbert, and Doody, and what
23 they seek is something that would be not the appropriate thing
24 for a Court to provide. It's trying to interfere -- I am
25 trying to look here for -- I apologize, Judge. I will look in

1 a moment and see exactly what the claim was and I will come
2 back to that on rebuttal.

3 But with respect to the law on it, one case that we cited
4 is *City of Los Angeles vs. Lyons*, Past wrongs do not in
5 themselves amount to that real and immediate threat of an
6 injury that's required for injunctive relief.

7 And *Dover vs. College of William and Mary* is another one.
8 A plaintiff cannot overcome the imminent harm hurdle required
9 under Article III, particularly given Coach Swanson's
10 dismissal, without a sufficient likelihood that plaintiff will
11 be wronged again in a similar way. Plaintiff's allegations of
12 future harm are neither imminent nor concrete, and she does not
13 have standing to seek injunctive relief under Title IX or
14 Section 1983.

15 This is the law on injunctive relief, Judge, and that
16 claim should be -- summary judgment should be granted for the
17 defendants.

18 THE COURT: But what about an action that's capable
19 of repetition even though by the time it gets to be
20 adjudicated, the plaintiff doesn't have immediate injury
21 themselves, that is, institutional repetition of the same kinds
22 of acts that may have occasioned the lawsuit by the plaintiff,
23 have you considered that?

24 MS. KANE: Your Honor, you know, that's not really an
25 issue here. There was never a problem with the policies that

1 the Board had. The problem, which is what they were asking for
2 in their injunctive relief, they -- their problem that has been
3 alleged in the lawsuit is with implementation or following of
4 those policies.

5 THE COURT: All right. I understand that. I am not
6 sure -- not just the policies, but they are saying follow them,
7 and I think that's actually the request. Anyway, I didn't hear
8 you argue that. I didn't know whether you were addressing it
9 or not.

10 MS. KANE: What they wanted -- here is their
11 injunctive relief: To supervise student athletes in high
12 school locker rooms; institute a program that prohibits a coach
13 from coaching unless that coach has completed mandatory
14 training on hazing, sexual harassment, and child abuse; and
15 affording such other relief as the Court deems proper. So that
16 injunctive relief claim, Your Honor, should be dismissed and
17 summary judgment granted.

18 THE COURT: But you are saying it should be dismissed
19 because these immediate plaintiffs will not suffer if those --
20 with those policy changes being implemented?

21 MS. KANE: That's correct.

22 THE COURT: Okay.

23 MS. KANE: That's correct.

24 THE COURT: All right. Is that it?

25 MS. KANE: Well, no, Your Honor. I just talked about

1 damages. I will go quickly --

2 THE COURT: Go ahead.

3 MS. KANE: -- because I want to talk about Title IX on
4 the merits. Title IX on the merits requires if there -- to be
5 a violation of Title IX, if there is a complaint of -- well,
6 the statute says, No person in the United States shall, on the
7 basis of sex, be excluded from participation in, be denied the
8 benefits of, or be subjected to discrimination under any
9 educational program or activity receiving federal financial
10 assistance.

11 You have to determine whether or not there is any basis
12 to impute liability to the institution if there is a student at
13 the educational institution who is subjected to harassment
14 based on sex. There has to be evidence that the harassment was
15 sufficiently severe or pervasive, and there has to be a basis
16 to impute that to the institution.

17 In assessing whether or not it can be imputed to the
18 Board of Ed in this case, one must look at the standard, and
19 the standard is: Is there actual notice to an appropriate
20 person and did that appropriate person respond to that notice
21 with deliberate indifference? So in determining who is an
22 appropriate person, that is defined as one who has the
23 authority to take corrective action to end the discrimination.
24 Under Montgomery County Public Schools policies, that would be
25 like a principal or an assistant principal. Receiving and

1 forwarding a report of sexual harassment is not enough to
2 create -- be an appropriate person. It has to be someone who
3 can correct the discrimination and end it.

4 Actual notice requires that the current sexual harassment
5 regarding -- be involving the -- that there is current sexual
6 harassment involving the parties, the plaintiff or the
7 perpetrator or both, so you need to have that to create actual
8 notice.

9 Actual notice occurs when an appropriate person receives
10 a report alleging sexual harassment and a reasonable official
11 would construe that report as alleging conduct prohibited by
12 Title IX. The report must be either, one, plaintiff specific,
13 or, two, identify the perpetrator to create actual notice.

14 The *Facchetti* Court, which is a Fourth Circuit decision,
15 held that without notice that the victim was being harassed or
16 that the specific perpetrator was currently harassing a
17 student, actual notice is not established prior to the attacks
18 at issue. Knowledge of five prior assaults did not establish
19 actual notice because different perpetrators, different
20 students.

21 An actual notice under Title IX is different than
22 negligence or 1983 or even gross negligence. It says, The
23 appropriate person must have actual -- not constructive --
24 actual notice, and the same people have to be involved.

25 The *Liberty* Court also cited and relied on *Facchetti*,

1 saying that, in the *Facchetti v. Bridgewater* case, in which the
2 Court acknowledged that the rampant prior sexual assaults on
3 its campus, of which Bridgewater was fully aware, could not be
4 used as evidence to establish actual notice.

5 The *Baynard* case, which is another Fourth Circuit case,
6 says that to create actual notice, it must be current
7 harassment, and that means something now, not past harassment.

8 Given this knowledge, then the person who receives the
9 actual notice and understands it to be a Title IX violation,
10 they must respond without deliberate indifference. Now,
11 deliberate indifference can be determined by the Court as a
12 matter of law under the *Davis* case.

13 The fact that somebody failed to fill out a form, which
14 is in one of the allegations in this case, that Ms. Crouse
15 didn't fill out a form when she heard a prior rumor that did
16 not identify the name of the victim or the name of the
17 perpetrator, that does not equate to the deliberate
18 indifference, and that's under *Doe v. Board of Education of*
19 *Prince George's County* and SV. Those cases are also in our
20 binder.

21 But the *Doe v. Prince George's County* says -- it was a
22 Fourth Circuit, 2015, unreported, says, The Court further
23 rejected any notion that the defendant's failure to follow the
24 procedures set forth in AP 4170 displays deliberate
25 indifference as the Supreme Court has held that the failure to

1 follow sexual harassment grievance procedures does not prove
2 deliberate indifference under Title IX, and then it cites to
3 *Gebser v. Lago Vista*, which is also in our --

4 THE COURT: That's a Fourth Circuit case?

5 MS. KANE: That one is Supreme Court. The *Doe v.*
6 *Prince George's County* is Fourth Circuit, 2015. *Gebser v. Lago*
7 is a Supreme Court case in 1998.

8 THE COURT: All right.

9 MS. KANE: And it says that just not filling out a
10 form is not enough to --

11 THE COURT: Just a couple more minutes and then I
12 need to hear from the other side.

13 MS. KANE: Further, there is also an allegation here,
14 and I will try to do this very, very quickly, but there was a
15 report to Colbert in 2017 from C.V. It was after the Doe 1
16 incident. And the report he received was -- from her was there
17 is something going on in the locker room about somebody shoving
18 a broom in somebody's pants. He said, Have the parent of that
19 person -- she did not identify the victim, did not identify the
20 perpetrators -- he said, Have the parent call me, and the
21 parent did not call.

22 There was another allegation from the plaintiff that a
23 second person had reported to Colbert, while he was coaching a
24 scrimmage and she was on the sidelines, Hey, what's going on in
25 the locker rooms? She admitted in discovery she doesn't know

1 if he heard her or not, but she was asking about activity in
2 the locker room.

3 Then, in November of 2017, a parent said to Crouse that
4 her son had heard from somebody else -- so we are in a rumor
5 land -- had heard from somebody else that somebody was
6 sodomized in the locker room. When Crouse got that
7 information, the person did not identify the victim, did not
8 identify the perpetrators.

9 Crouse told her supervisor, Brian Scriven, the director
10 of school support and improvement, she referred -- she called
11 SVID, Special Victims Investigative Division, from the police,
12 and she also referred the matter to the school resource
13 officer, a County employee, not a Board of Ed employee, under
14 the memorandum of understanding with the schools and the
15 County, and she referred it to him to find this son who heard
16 this rumor, determine who it was, and find out what happened.

17 The school resource officer talked to the son. The son
18 gave him the name of the victim. The school resource officer
19 talked to the victim, who, and according to what the school
20 resource officer told Crouse, denied that anything had
21 happened.

22 THE COURT: I need for you to wind up. Just a couple
23 more minutes.

24 MS. KANE: Okay. Almost done.

25 As a result of that, Crouse then -- she had responded.

1 She did not know who this individual was, so it's not actual
2 notice under the framework that I gave you. Because she
3 doesn't have the identity of a perpetrator or a victim, she did
4 not respond with deliberate indifference because she notified
5 her supervisor, she called SVID, who told her that they would
6 not go on a witch hunt because they didn't have any -- all the
7 information they needed, and she also, you know, had -- yeah,
8 she had -- she had had these things done. So she was not
9 deliberately indifferent.

10 THE COURT: All right.

11 MS. KANE: Thereafter, it was learned, after this
12 lawsuit was filed in 2019, that the C.V. report, the one on the
13 side of the scrimmage on the sidelines and what's called the
14 Hayes report to Crouse in 2017, were all about the same
15 incident, which was Doe 1, but the Board did not know that Doe
16 1 was the victim until this lawsuit was filed in 2019.

17 THE COURT: I need you to sit down now. I'm sorry.
18 You got to stop.

19 MS. KANE: He never reported it.

20 THE COURT: I know you can go on for a while. It's
21 an interesting issue. But I have got to hear from other
22 counsel. So Mr. Maloney, you are up.

23 MS. KANE: Thank you, Your Honor.

24 MR. MALONEY: Thank you, Your Honor.

25 I'd like to address first the questions that the Court

1 was raising about the verdict sheet and what will happen with
2 respect to emotional damages. And we agree with the premise of
3 the Court's question. There is only one set of damages for
4 each individual plaintiff, and the jury will only be told about
5 one set. It wouldn't make any sense, for a whole variety of
6 reasons, to have the jury go back and try to assess what
7 damages are for 1983 as opposed to negligence as opposed to
8 Title IX. That gets incredibly messy, and it's almost never
9 done.

10 And the analogy I would give to the Court is this: What
11 typically happens on the negligence claim, because there are
12 statutory caps which apply to those, the jury is not told about
13 the statutory caps even though they wouldn't -- just as they
14 wouldn't be told about the damage limitation that may or may
15 not apply in Title IX. Instead, they will be told everything,
16 and the Court, posttrial, typically hears post-trial motions,
17 and if, for instance, we exceeded the cap, there would be a
18 motion to bring us under the cap. If the case law was clear at
19 that point that Title IX couldn't allow emotional damages, that
20 would be reduced as well.

21 But this is essentially -- the motion in Virginia was a
22 motion in limine, but it's really a post-trial issue that ought
23 to occur because, for instance, all of these damages are
24 available in 1983. Punitive damages, the Fourth Circuit has
25 said very clearly, are available for 1983 where there was

1 deliberate indifference. Emotional damages are available in
2 1983. They are available in negligence. And it remains -- the
3 case law is all over the map on what the impact of the *Cummings*
4 case will be here.

5 So, for that reason alone, this ought to be something --
6 and by the way, it's a rapidly moving landscape in terms of
7 what the spending clause was going to be. None of this existed
8 two years ago, and it may not exist -- we don't know what the
9 Supreme Court is going to do a year or two from now. So I
10 think it would be premature for the Court, for something that's
11 really a post-trial motion, to make some rulings on it based
12 upon the case law.

13 And when I say "rapidly moving landscape," the Fourth
14 Circuit, by the way, has never ruled that there are not
15 emotional damages in Title IX, nor has the United States
16 Supreme Court, and, in fact, the current binding case law from
17 the Fourth Circuit and Supreme Court is that it is binding in
18 there.

19 And the -- and in a number of -- some Courts have applied
20 *Cummings* to Title IX, but others have not. For instance, in
21 Indiana, on July 20th last year, *Doe vs. Purdue University*, the
22 Court said, *Cummings* was not a Title IX action. It does not
23 make evidence of emotional distress or harm inadmissible in
24 this case; therefore, such damages will not be precluded. And
25 there are a number of cases around the country that say that.

1 One of the theories of *Cummings* was a rehabilitation
2 case, and the Supreme Court has only applied it to ADA and
3 Rehabilitation. One of the theories of this spending clause
4 litigation is, well, the recipients of the federal funds were
5 not on notice that they might have liability. Well, recipients
6 like Montgomery County have long been on notice that there
7 would be liability for emotional damages under Title IX.

8 The case law in the Fourth Circuit and around the country
9 is replete with Title IX cases that have emotional damages.
10 The Supreme Court said, in *Franklin*, Congress did not intend to
11 limit in any way the remedies in a suit under Title IX. The
12 Supreme Court has said, in *Gwinnett*, that if you were to take
13 some remedies out, there would be no remedy at all with respect
14 to a victim of sexual harassment in this case. It would leave
15 the potential remediless [sic].

16 And in 2009, the Supreme Court in *Fitzgerald*, said,
17 quote, The Title IX petitioner can file directly with the Court
18 and obtain the full range of remedies. Congress did not intend
19 to limit the remedies available in suit under Title IX.

20 So the recipients have long been on notice that a full
21 range of remedies would be available here, and I assume,
22 ultimately, that's an issue that's going to find its way to the
23 Supreme Court. If stare decisis means anything -- and, of
24 course, these days, it means different things to different
25 people -- that what the Supreme Court has said repeatedly in

1 the last 15 years ought to be sufficient notice to the
2 recipients, the federal fund recipients.

3 THE COURT: While we are on this, what do you think
4 about the possible distinction between the indignity of the
5 impact versus the emotional sequelae under Title IX?

6 MR. MALONEY: Thank you for that. I was just getting
7 to that question. It has long been recognized that separate
8 and apart from emotional damages is the actionable -- is the
9 right to bring an action for invasion of bodily integrity, and
10 there is a rich body of case law throughout the country that
11 treats that as a separate cause of action. Not a cause of
12 action necessarily for emotional damages, although it may flow
13 from it, but the cause of action is actually for the -- what
14 the Court described as an impact and what the case law
15 describes as invasion of bodily integrity. And one of the
16 whole points -- and there is a lot of Title IX case law
17 upholding actions where the bodily integrity occurred here.

18 In addition to the bodily integrity claims, one of the
19 essence of Title IX claims, in fact, the essence of Title IX is
20 the deprivation of educational opportunity. So the -- there is
21 a claim here for loss of educational opportunity. In my case,
22 my client completely lost their ability to attend a public
23 school. It was impossible --

24 THE COURT: Who are you speaking for now?

25 MR. MALONEY: John Doe No. 4. I am speaking for 2,

1 3, and 4, but our client, No. 4, it became so bad at Damascus
2 that he had to transfer to a private school just to survive,
3 and he lost the educational opportunity that he was entitled to
4 under Title IX, and that's separately compensable from the
5 emotional damages.

6 And even if we were to provide or assume the *Cummings*
7 framework here that was applied to the Rehabilitation Act, they
8 said, Well, only damages which have traditionally been allowed
9 in a contract setting. Well, a number of contract settings,
10 particularly for claims like these, allow for emotional
11 damages, and specifically -- I will give the Court an
12 example -- these negligent security cases against apartment
13 houses where someone has, for instance, been sexually attacked
14 or raped because the apartment house fails -- the landlord
15 fails to provide appropriate measures.

16 Well, those cases are typically brought in two counts.
17 One would be the tort of negligence, but secondly, and
18 importantly, the breach of contract for a breach of the lease,
19 a breach of the provisions in the lease requiring that they
20 provide security for the -- adequate security for the tenants.
21 And the tenants, almost always in that case, bring a claim for
22 contractual violation of the lease, and the Courts almost
23 always in those cases allow for non-economic damages as well as
24 invasion of bodily integrity and the other things flowing from
25 the landlord's breach of contract by failing to provide

1 security.

2 That's one example. We can provide lots and lots of
3 examples where, in the contract setting, these kind of damages
4 are available.

5 But as I indicated, this is a very, very fast moving
6 landscape, and where we are now may look differently. Just as
7 where we are on the negligence claims, the General Assembly
8 addressed the cap issue this year, and that's going to be
9 heading to court soon. In fact, there is an interlocutory
10 appeal provision in that law, so the Court -- just as the Court
11 would not issue summary judgment on damage caps there, they
12 should not -- the Court should not enter summary judgment now
13 but wait and see what the case law is, wait and see what kind
14 of evidence is developed in terms of what kind of damages are
15 going to be offered, and then make a judgment, probably not in
16 limine but posttrial, because all of these things, as the Court
17 pointed out, would be admissible for the other counts.

18 So I don't think there is any reason for a premature
19 grant in the middle of this burst of *Cummings* case law that we
20 have around the country.

21 Now, Your Honor, we spent a lot of time this morning,
22 almost all of our time, with the exception of the duty gross
23 negligence, talking about John Doe No. 1, which was August the
24 1st of 2017. We spent virtually no time this morning talking
25 about October the 31st, 2018. And an extraordinary number of

1 events occurred between August the 1st of 2017 and October 31,
2 2018, the date that John Does No. 2, 3, and 4 were anally raped
3 with broom sticks in the locker room at Damascus.

4 First of all, they answered some of the Court's questions
5 this morning about who was there and what the setting was. The
6 John Doe No. 1 case in August was not during the school year.
7 It was during the summertime where you had summer practices in
8 the morning and afternoon. This was during the school year.
9 These were after school practices, and that's important because
10 the timing here is critically important. The school day at
11 Damascus ended at 2:30 p.m. Then there would be practices
12 beginning, but the JV practice did not begin until 3:30 p.m.,
13 so the JV football team had one hour of complete free time.

14 In terms of supervision, there was zero supervision in
15 2018, although there had been prior to 2017. The reason there
16 was zero supervision are severalfold. First of all, Head Coach
17 Wallich, the head coach of the varsity, would take the varsity
18 team on the field at 2:50 p.m. That meant from 2:50 p.m. until
19 JV started at 3:30, there would be 40 minutes of completely
20 unsupervised time.

21 The JV football coach, Colbert, wasn't there at all. Why
22 was he not there at all? Because he had employment outside the
23 school. He was not a school employee, just a contractual JV
24 coach. According to the testimony of school staff under oath,
25 he typically would not arrive until about 3:40 or 3:45, and he

1 would go directly to the field where the JV practice was
2 occurring.

3 And the athletic director was virtually never there. He
4 had responsibilities for other sports. He had responsibilities
5 inside and outside the building, and he was not there at all.

6 The assailants, themselves, testified under oath that
7 they rarely, almost never saw a coach there in the locker room
8 ever, and that includes whether -- except they might come in
9 incidentally to walk through or something like that, and that
10 was a rarity.

11 Now, what aggravated this are two things, and they were
12 deliberate decisions by the principal, Casey Crouse, to remove
13 safety guardrails to protect the safety of the team and the
14 school building as well. One involved the JV football team
15 after school and one involved the lead assailant, initials
16 J.C.A.

17 She arrived in the summer of 2017. When she arrived in
18 the summer of 2017, the JV football team, for that one hour of
19 supervised time, was required by the previous principal to be
20 in study hall. And they had study hall in a number of areas.
21 The principal 's name was Jennifer Webster who had been there
22 from 2013 to 2017. And they met under the supervision of an
23 adult until the coach arrived, and they would be in a media
24 center, a security office, or other place, and they had to be
25 there under the supervision until the coach arrived and the

1 supervision could transfer. There were no problems necessarily
2 reported with the JV conduct at all at that point.

3 Now, what happened was when Crouse arrived, she
4 eliminated the study hall. She did so because the athletic
5 director and the coaches didn't like it. And why didn't they
6 like it? Because the kids didn't like it. And why didn't the
7 kids like it? Because they are kids and kids don't like study
8 hall.

9 So over the objections, the vociferous objections of her
10 staff, including the assistant principal, the principal
11 eliminated the study hall requirement, and made an affirmative,
12 deliberate decision to allow the students to be unsupervised
13 for the one hour from 2:30 to 3:30.

14 But it's worse than that. Once she did that --

15 THE COURT: Sorry. Then where would they be from
16 2:30 to --

17 MR. MALONEY: That's a very good question, Judge, and
18 the answer is everywhere. Primarily the locker room, because
19 that was sort of the boys club, the center of it, where they
20 would hang out and do what they did in the boys club, if you
21 will, but also they would run rampant throughout the school
22 building and also across the street.

23 One student was involved in a theft, one JV football
24 player, at the market right across the street. The police got
25 involved. He was temporarily suspended by one of her

1 subordinates, I think Wallich, from the football team. So when
2 it came to her desk, she was offered -- and the police got
3 involved. When it came to her desk, she was offered a chance
4 to see the video depicting the theft clearly that the store
5 handed in, but she said, I don't want to see the video; I don't
6 need to see the video; I don't believe that it happened, even
7 though it was on film; and she reversed the suspension and
8 allowed him to come back.

9 But it was so bad --

10 THE COURT: Is that person one of the perpetrators
11 eventually, or not?

12 MR. MALONEY: I don't think that particular one was,
13 no. But it became so bad that the JV football team began
14 running rampant throughout the school, and there were reports
15 of disorderly conduct, yelling, disruption, and so forth.

16 Finally, it got so bad that the vice principal,
17 Ms. Jules, and the director of security, Michael Hancock,
18 repeated month after month in the school operations meeting to
19 bring back the study halls so that we could restore some order
20 in terms of the JV conduct where they had been allowed,
21 basically, to run wild for that entire one-hour period after
22 that.

23 And it was so bad that other teachers began to get
24 involved. TJ Johnson complained about it. Indeed, the week
25 before this assault, October 31st, 2018, the week before,

1 another teacher complained bitterly and sent emails. Assistant
2 Principal Jules said, I received repeated complaints about the
3 JV during this hour. Destruction of school property --

4 THE COURT: This is all prior to October --

5 MR. MALONEY: This is all prior to October 31st.

6 Destruction of school property, theft on and off the
7 property, lack of supervision, disrupting the building,
8 vandalizing the building.

9 Kenneth Howard, the building service worker, complained
10 to Mr. Doody that the students were vandalizing the locker
11 room.

12 Alan Fischer, the building service manager, said he spoke
13 directly with Principal Crouse about this lack of supervision
14 and damages, but he felt his concerns were not taken seriously
15 because football coaches at Damascus are, quote, untouchable.
16 And keep in mind Damascus, at that point, was on the cusp of
17 getting 61 consecutive wins, breaking a state record, and close
18 to winning a national record of undefeated wins as well, and
19 the team, they called themselves the Damascus football
20 community, and no one, no one in this room is going to dispute
21 that the Damascus school identity was entirely wrapped around
22 the success of the football team, and that drove the
23 decisionmaking of Principal Crouse and the fact that these
24 players were considered untouchable, and what Coach Wallich and
25 the AD wanted, they got.

1 And Coach Wallich, even though teachers and supervisors
2 and her own vice principal and her own security director were
3 begging to reinstate the study hall, she wouldn't do it because
4 the football team didn't want it. And there is no real dispute
5 about that, frankly.

6 Security team Hancock told investigators that the locker
7 rooms and hallways became a huge security concern. He said he
8 shared these concerns with Principal Crouse, Doody, and the
9 assistant principals repeatedly at the 2017 and 2018 operations
10 meetings, but nothing was done. He said he would then send
11 emails to both Principal Crouse and Athletic Doody about the
12 events that were occurring, the lack of supervision and
13 behavior of the JV team, and his emails to them would go
14 unanswered and they would not take action. TJ Johnson
15 complained about the lack of supervision of the team after
16 Crouse abolished study hall.

17 Teacher Judith Baggett-Stone, a teacher at Damascus, said
18 on three occasions she contacted Doody, Hancock, and Colbert to
19 report the misconduct of the JV students, and she reported to
20 them about the behavior of the students in the building, that
21 they were out of control, that no one was here to supervise
22 them, and finally, she had to get the security desk involved
23 because there was no one else supervising them.

24 Nine days before the October 31st attack, on October
25 22nd, she sent an email to Principal Colbert [sic] reporting,

1 quote, The JV football team really needs to be supervised after
2 school because they were being so disruptive. Nine days before
3 the assault here. She --

4 THE COURT: From whom to whom?

5 MR. MALONEY: This is from the teacher to principal
6 -- to Colbert, the JV -- the JV coach.

7 She texted the athletic director on October 29th, two
8 days before the attack, saying, The JV football team needs
9 supervision. It's after 3:15. They are running around,
10 yelling, et cetera, et cetera, outside my classroom.

11 THE COURT: Now, that's Doody?

12 MR. MALONEY: That's to Doody. Correct.

13 She testified that repeatedly her complaints were -- and
14 they weren't alone. This was well known throughout the school,
15 and it was -- the irony of it, Judge, it was a simple fix. The
16 previous principal had basically had a study hall with adult
17 supervision for that hour, and they had to be there, and they
18 didn't have problems.

19 It was obvious to the entire building, especially her
20 assistant principal and director of security, who repeatedly,
21 in writing and in person and at monthly meetings, begged her to
22 reinstate the study hall, but she didn't want to upset the
23 football coach because football was king. So that sets the
24 table for what was going on there with the JV football team.

25 Then we get to the brooming incidents which occurred

1 prior to October the 31st, 2018. And I am going to talk about
2 the number of brooming incidents and then identify specifically
3 those that we can show actual notice of to -- to the leadership
4 of Damascus High School and to the coaches.

5 First of all, one of the assailants, October -- one of
6 the assailants in this case, C.T., was broomed in 2017.

7 THE COURT: One of the assailants in October of 2018?

8 MR. MALONEY: Was broomed in 2017. He was one of the
9 assailants of the October 31st, 2018. He testified that he,
10 himself, the assailant, was broomed the previous year, in 2017,
11 and he said he felt humiliated, scared, and ashamed.

12 Another player --

13 THE COURT: Did he complain?

14 MR. MALONEY: Pardon me?

15 THE COURT: Was a complaint made to anyone?

16 MR. MALONEY: No, not in that case, and I am going to
17 identify which complaints were made as a result of these.

18 THE COURT: All right.

19 MR. MALONEY: Another player, S.D., recalled seeing
20 that player being broomed.

21 Another one of the --

22 THE COURT: That second person was not himself a
23 victim --

24 MR. MALONEY: Correct.

25 THE COURT: -- or a perpetrator?

1 MR. MALONEY: Well, no. He was a witness, not a
2 perpetrator.

3 THE COURT: A witness to the October 2018?

4 MR. MALONEY: Yes. Yes.

5 THE COURT: All right.

6 MR. MALONEY: Now, another October 31st assailant,
7 Assailant W.S., was attacked in the locker room before practice
8 when he was a freshman approximately the last day before the
9 last game of the season, which is about the same time when this
10 happened, towards the end of the season, and that is apparently
11 the tradition at Damascus. This is part of a season-end ritual
12 that occurred involving the football team. He was on the way
13 to the JV locker room to get changed, he was grabbed by two
14 players, he was thrown face down on the ground, and attacked
15 with a broom. Ironically, we see this -- the abused student
16 then becoming the abuser, a pattern, which, of course, is not
17 unknown.

18 In another incident, a freshman named D was -- let me
19 pull this, page 17, if you would pull it -- was broomed, and he
20 was specifically broomed there at that time. Can I have page
21 17?

22 In early 2017 season, John Doe No. 1 was inside the
23 locker room, and you have heard a lot about that today, which
24 happened on October the -- which happened on August the 1st,
25 2017.

1 And then in around September of 2018, members of the
2 football team would be waving around a broom in the locker
3 room, poke players with a broom. One plaintiff, M.T.,
4 testified that two players who broomed No. 1 would sometimes
5 come in and tell the other JV players -- they would scare us --
6 that they would give us the broom. Others said that threats
7 about the broom were almost every day, particularly student
8 J.C.A.

9 Now, in addition to all of those, we additionally had
10 reports of other brooming that were given to the administration
11 as well as other sexual assaults in locker rooms in Montgomery
12 County.

13 On February the 8th, 2018, before this assault, at
14 Gaithersburg High School, there was a digital assault by a
15 wrestler against a fellow wrestler in that locker room. The
16 digital assault was captured by the other players -- the
17 wrestlers on video. The video went viral. It was part of an
18 overall similarly unsafe situation at Gaithersburg where the
19 building had gotten out of control. Large number of statistics
20 in Gaithersburg about what happened.

21 Just like what happened here, the principal tried to
22 cover this up and not report it immediately to the Montgomery
23 Police, as she is required to do under her agreement with the
24 State's Attorney's Office and the police department, but that
25 clearly occurred in an unsupervised locker room.

1 Similarly, on September 18th, 2018, this is just -- this
2 is just six weeks before this particular assault, we have a
3 situation here where at Seneca Valley, they took a -- a number
4 of players took one player in the locker room, the locker room
5 had been chronically unsupervised, and he was digitally
6 assaulted in the locker room at Seneca Valley. The Board of
7 Education became aware of this within about three days.

8 In addition to all of this notice, they received numerous
9 notices from others complaining to them about what happened --
10 about other broomings.

11 THE COURT: Let me have you move off that. I want to
12 hear you on J.C.A. A few more minutes.

13 MR. MALONEY: I will get to J.C.A.

14 THE COURT: Let's get to him right away.

15 MR. MALONEY: And Your Honor, briefly, those other
16 reports, the Board has even acknowledged that they had one of
17 those reports and did really almost nothing about it, and in
18 one case admitted that the individual who had the files and
19 prepared them threw them in the dumpster when he left his --
20 his -- his employment in Montgomery County, and the only reason
21 we have them is one administrator in the central office was
22 there and took detailed notes about the report of the brooming,
23 the sexual assault, what he reported, and, of course, that
24 nothing ever happened. And that's detailed extensively --

25 THE COURT: Somebody at the Board had -- had a report

1 on a brooming that was, what, discarded?

2 MR. MALONEY: And we have detailed that, Your Honor,
3 beginning at pages 19 through 21 where that was -- and they
4 were required to report these on a Form 235 and 236, which
5 they, of course, did not do. And she admitted, Casey Crouse,
6 the report was made directly to her, and she basically had no
7 meaningful follow up. She called the police and said, Well, we
8 don't know who it is. It was such a vague report, almost
9 deliberately calculated to keep the police away, and then there
10 was no meaningful follow up. Nobody called the athletic
11 department. It was dealt with in great detail.

12 THE COURT: Let's get to J.C.A.

13 MR. MALONEY: Now J.C.A. J.C.A., Your Honor, is an
14 extraordinary situation. J.C.A. has one of the longest records
15 of disciplinary problems in the Montgomery County School
16 system. We took the head of the -- head of student
17 discipline's deposition here. Prior to coming to Damascus that
18 fall, J.C.A. had ten suspensions. He had 61 formal
19 disciplinary referrals. He had 189 disciplinary log entries.
20 And those are just what were written down.

21 They included such things as sexual assaults on females,
22 asking one female to grab his penis publicly, touching another
23 young lady on the rear end, another on the shoulder. Once he
24 kept trying to have sex, saying he wanted to have sex with a
25 girl repeatedly, was told to stop, and didn't, and when the

1 boyfriend objected, he hurt the boyfriend so hard that he had
2 to be hospitalized.

3 Another occasion, he took a young man, lured him out to
4 the back of the school by promising a sexual encounter, and
5 instead robbed him of his cell phone. The Montgomery County
6 Police had to get involved.

7 Assaulted teachers, assaulted and harassed teachers and
8 students. Was kicked out of summer school.

9 He then goes to Clarksburg, and the situation at
10 Clarksburg is so bad they put him in aggressive monitoring.
11 They try in-school suspension. They try out-of-school
12 suspension. They try one-on-one counseling. None of that
13 works. He has repeated disciplinary violent issues, disruptive
14 issues, insubordinate issues.

15 So, finally, he is required to have a full-time adult
16 escort, staff escort at all times, 100 percent of the time when
17 he is in the Clarksburg building. And even that, even that
18 didn't stop his misconduct.

19 Finally, Clarksburg threw up their hands and said to his
20 mother, You need to be an in an alt two disciplinary
21 environment, an alternative disciplinary school. She didn't
22 want to do that. So, instead, she withdrew him and took him
23 over to Damascus where he is in high demand. Why? He is an
24 outstanding football player. Good question: Would this have
25 been tolerated with someone without his football prowess? We

1 don't know.

2 But what we do know is that in 2018, the day he came to
3 register at Damascus, Mr. Melott, the school resource officer
4 from Clarksburg, had just been transferred to Damascus, and he
5 sees J.C.A. walking in with his mother, and he goes, Oh, my
6 gosh, this is terrible. So he goes in to talk to Principal
7 Crouse, said, You need to be aware that these are serious
8 problems; you need to be aware of the great level of
9 supervision that we placed on him; you need to be aware that he
10 needs to have somebody with him all the time, 100 percent of
11 the time. And she ignored it, refused to do it.

12 But then it got worse. Then, Deborah Yakubik, who had
13 been a member of J.C.A.'s educational management team at
14 Clarksburg, then moved over and became a staff pupil personnel
15 worker at Damascus. She was shocked when she saw J.C.A. there.
16 She went directly in to Principal Crouse and said, You need to
17 know how bad this is. One of the worst she had ever seen. A
18 danger to people in the building.

19 Not only does she go to Principal Crouse, she takes the
20 alt two disciplinary file, which shows his complete
21 disciplinary file, gives it to Principal Crouse, and said, You
22 need to review this, and you must put him on 100 percent all
23 day supervision or people will be at danger or at risk.

24 Your Honor, I have seen this file, as have other counsel.
25 It's about this high (indicating) from the desk.

1 THE COURT: You are making a, what, three feet? That
2 looks to me like what you are suggesting.

3 MR. MALONEY: I would say about two-and-a-half to
4 three feet, Judge. It's a big -- and I know the Court thinks I
5 might be exaggerating. I am not. It's about two-and-a-half-
6 to three-feet big. So what does Principal Crouse do? She
7 refuses to read the file; admits she never looked at the file;
8 never cared. Instead, she made an affirmative decision to
9 remove all of these safety guardrails that had been put in
10 place by Clarksburg.

11 THE COURT: I am going to need to wind up with you,
12 Mr. Maloney, on any other points.

13 MR. MALONEY: I will simply say, in the end, Your
14 Honor, that in the -- in the two months after he arrived at
15 Damascus, he had two physical altercations with students --

16 THE COURT: This is all before the events of October
17 --

18 MR. MALONEY: This is all before the event. This is
19 after he showed up at Damascus, after Principal Crouse -- she
20 says she wants to give him a fresh start. Okay? She has
21 removed all supervision; doesn't even have a behavior
22 improvement plan; doesn't have anything to monitor him.
23 Everything they had done at Clarksburg, she made an
24 affirmative, deliberate decision to remove.

25 In those two months, he had two physical altercations

1 with students. He assaulted a parent educator in the hallway
2 just two weeks before October 31st. He attempted to broom
3 other teammates prior to this. He attempted to broom two
4 freshman football players in the locker room in August of 2018.

5 On September 27th, 2018, he attempted a head butt of a
6 student during a fight. The parent educator, Melissa Ramsey,
7 had been hit in the head in the hallway requiring a visit to
8 the school nurse. And then the following day after that, he
9 hit in the head a student on the bus.

10 What did Principal Crouse and the administration do with
11 all of these events before October 31st? Nothing.

12 THE COURT: Were they all reported?

13 MR. MALONEY: All reported. I am not sure about the
14 locker room incident, but they all -- all the rest were
15 definitely reported. He received no discipline of any kind.
16 He received no supervision intervention of any kind. And,
17 again, just like what we saw before with the JV team as a
18 whole, he's a football player, and so Principal Crouse and the
19 leadership of the school did nothing, and the football team
20 allowed him to continue to play even though the coaches had
21 authority to suspend him, remove him from the team, and remove
22 him from the locker room.

23 It turns out on October 31st, 2018, not surprisingly, he
24 was the leader. He contrived, he came up with the idea of
25 doing it that day. He led the other assailants in doing it.

1 He was, by all accounts, the major factor in making the
2 brooming and the violent assault that day.

3 THE COURT: I have a question. Injunctive relief,
4 are you going to address that?

5 MR. MALONEY: I will.

6 THE COURT: The claim is that you don't have that
7 standing.

8 MR. MALONEY: Well, Your Honor, the problem is this
9 is a classic case of capable of repetition, yet evading review.
10 We have a situation now where we filed suit promptly back after
11 2018. We are now five years, almost four-and-a-half years
12 later. We had COVID in the meantime. The case wound its way
13 through the system. If this is not allowed to proceed and they
14 lack standing, this means that no high school student will ever
15 be able to seek injunctive relief because by the time the case
16 gets to an issue, they are going to be graduating. It will be
17 a permanent impossibility for high school students to bring
18 standing, and they have the right to say, on behalf of
19 themselves and others, We want a safe environment.

20 And all parties -- and finally, I will close with this.
21 I would like to read to you what Wallich wrote to his staff on
22 October 11th, 2018, the coach. This is 20 days before the
23 assault. As most of you know, J.C. is not doing well with his
24 transfer. I get an email or phone call almost every day about
25 his behavior in class and bullying. I have made it clear if

1 there are other incidents, he's going to be suspended
2 indefinitely if he doesn't get in line. He goes on to say he
3 can't control himself.

4 Well, of course, he wasn't suspended. They wanted to win
5 the title, which they did; they wanted to break the state
6 record, which they did; and in the process, he was let loose in
7 the locker room, and we see what happened.

8 THE COURT: All right. Mr. Ruff. Am I right,
9 Mr. Ruff, are you up? I'm sorry. Briefly, yeah, you are up.

10 MR. RUFF: I will try and be as brief as possible.

11 On behalf of the Doe Plaintiff 1, we would obviously
12 adopt the portions of that argument that would apply to us.
13 And I know the Board is probably going to argue in rebuttal
14 that, you know, anything that happened after the assault of Doe
15 Plaintiff 1 shouldn't be attributed to whether or not he has a
16 viable Title IX claim, but I think that's also a genuine
17 dispute of fact.

18 It will -- you know, all of this course of conduct
19 between when Doe Plaintiff 1 was assaulted, sexually assaulted
20 and October 31st when J.C.A. and the rest of the goon squad
21 came through and assaulted the rest of the plaintiffs shows the
22 deliberate indifference that this -- this system, this school
23 showed towards Doe Plaintiff 1 after having -- after having
24 proper notice of his sexual assault back in October 1st --
25 excuse me, August of 2017.

1 I will say that an appropriate person had actual
2 knowledge of his assault. Principal Crouse did, and the Board
3 conceded that, just now in their argument, that Faith Hayes,
4 when she reported to Principal Crouse that a freshman player
5 had been sodomized, that was Doe Plaintiff No. 1, that was in
6 November of 2017, and their response to it was deliberately
7 indifferent, and there was -- there was notice. There may be
8 an argument in rebuttal that there was no actual notice prior
9 to --

10 THE COURT: Well, let me ask you this: Is there
11 something like -- having heard the recitation by Mr. Maloney
12 that this was a tradition, and even one of the perpetrators in
13 late October of 2018 had been a victim before Doe 1, that's
14 what I heard I think.

15 MR. RUFF: That is the -- that is the inference.
16 Right? I don't think we have any specific direct evidence that
17 says in '16, '15, '14, but we have the testimony of these young
18 men that says we heard about it before it ever happened to us.

19 THE COURT: That's what I was going to ask, you know,
20 whether -- maybe you don't have anybody on the defense side
21 saying yes, we were aware of this tradition, but is there
22 something like a willful blindness argument that can be made
23 here? That's sort of analogous to the criminal situation where
24 something is going on and you are not paying attention when you
25 should be.

1 MR. RUFF: Absolutely. At least, you can say, from
2 when Doe Plaintiff 1 was assaulted until October 31st, there
3 was a rash of brooming that occurred --

4 THE COURT: Well, not actually occurring to your
5 client before; that is, the tradition presumably predates?

6 MR. RUFF: I think there is an inference that can be
7 made that there was a willful blindness about what was
8 happening and that this young man is what actually started the
9 ball rolling to expose it, and October 31st was what turned it
10 on its head and actually blew it up and made sure that the
11 public knew what was happening at Damascus High School.

12 But beyond that, Your Honor, the *Doe v. Fairfax* case
13 provides actual notice simply from the fact that this was
14 reported to an appropriate person, Principal Crouse, shortly
15 after it happened in August, and there was a deliberate --
16 deliberately indifferent response to it that made --

17 THE COURT: This is the one without the names, you
18 mean, without the specifics, according to Ms. Crouse?

19 MR. RUFF: Right. Even without an actual incident
20 happening before Doe Plaintiff 1 was assaulted, before he was
21 sexually assaulted, the *Doe v. Fairfax* case stands for the
22 premise that notice is satisfied when a school official is
23 alerted to the possibility -- even the possibility of sexual
24 harassment or receives a report that can objectively be
25 construed as alleging sexual harassment.

1 Further, it stands for the premise that a school system
2 can be liable for pre-actual notice incidents of severe sexual
3 harassment if the response to the single notice is deliberately
4 indifferent and makes plaintiff more vulnerable to future
5 harassment, or combines systemic effect of denying equal access
6 to a scholastic program or activity.

7 THE COURT: Stay for a moment with the pre-August
8 2017 report --

9 MR. RUFF: Okay.

10 THE COURT: -- where the, apparently, ambiguous -- no
11 name is given, apparently, of either the victim or the
12 perpetrator. Correct? Is that a situation? Is that a factual
13 -- is that the one where you are saying that the principal did
14 not do any follow up on that?

15 MR. RUFF: So, that happened after Doe Plaintiff 1
16 was sexually assaulted.

17 THE COURT: Oh, after Doe Plaintiff 1?

18 MR. RUFF: Correct. And so that's why we are quoting
19 the *Doe v. Fairfax* case because we are saying even if you don't
20 have this actual notice before August, right, and I think you
21 are right, there is an inference that this was happening,
22 right, I think we would be able to --

23 THE COURT: Well, who is saying that it was
24 happening? The players?

25 MR. RUFF: The players.

1 THE COURT: The victim perpetrator said --

2 MR. RUFF: Victims, perpetrators, witnesses.

3 THE COURT: So the question is how could these things
4 be happening without somebody on the school side knowing about
5 it; is that --

6 MR. RUFF: I think it's because it was -- it was
7 meant to be kept a secret. My client, Doe Plaintiff 1, was
8 told by his attackers, You better not tell anybody or we are
9 coming back at you. So this was an insular thing that was a
10 cycle that was insidious.

11 And because of the deliberate indifference, because of
12 the willful blindness, it wasn't exposed until it just became
13 so large and became so out of control that it was impossible
14 for it not to come out. And luckily, Doe Plaintiff 3 was
15 strong enough and courageous enough to finally tell an adult
16 and the whole thing turned on its head, and it's probably good
17 for the classes that came after them, but for these young men,
18 they deserve compensation for it.

19 So the defendants talk about the fact that, you know,
20 there was no actual notice to an appropriate person, that this
21 is a rumor. The cases do not support that. Even in a case
22 like this, the system -- when the system denies knowledge of
23 harassment, we can still prove that there was a denial of equal
24 access to a scholastic program or activity; that even if a
25 school official subjectively don't believe that sexual

1 harassment happened like in this case, because Principal Crouse
2 never even asked for the victim's name when it was -- when this
3 incident was reported to her, did not complete the proper forms
4 for reporting when she found out about the sexual assault that
5 occurred to Doe Plaintiff 1, did not contact CPS, which
6 Ms. Simmons -- what was her role?

7 THE COURT: Well, I understand. Some of what you are
8 arguing may have a direct influence on Does 2, 3, and 4. I am
9 still trying to sort out exactly how Doe 1 comes into the
10 picture.

11 MR. RUFF: How Doe 1 comes into the picture --

12 THE COURT: Well, Doe 1 -- I am trying to understand
13 your argument specifically as to what defendants knew or should
14 have known before what happened to Doe 1.

15 MR. RUFF: What I am saying is that the cases state
16 very clearly that even if there was no previous actual notice
17 by the defendants being advised shortly thereafter and by them
18 deliberately -- having a deliberately indifferent response to
19 their advisement which then created a situation where he was --
20 was losing equal access to scholastic programs and activities,
21 that serves as actual notice based on the *Doe v. Fairfax* case.
22 That's what that holding says in that case is that there does
23 not have to be a incident. Right?

24 That's what I was saying earlier is that we don't have to
25 wait, under Title IX, for someone to get raped and then have --

1 and then the school has actual notice of the rape for the next
2 person to actually be able to hold them accountable.

3 What the *Doe v. Fairfax* case says is that if they get
4 wind of even the possibility, right, the possibility of a
5 sexual assault, and they do not respond appropriately, and it's
6 so severe and their response is so deliberately indifferent,
7 that it creates a -- an inequity as far as their scholastic
8 activity is concerned, and there is a whole criteria for that,
9 then that is notice. That serves as notice.

10 THE COURT: Very good. That's as much as I need.
11 Let me go back quickly and get a response.

12 MR. RUFF: Thank you.

13 THE COURT: Thank you.

14 MS. KANE: With respect to Doe 1, no actual notice
15 prior to the happening of his incident on August 1, 2017.

16 With respect to his argument on *Doe v. Fairfax*, different
17 case, different facts. In that case, students are on a band
18 trip; a girl and a guy on the bus; blanket over them;
19 allegation of inappropriate sexual touching. It was reported
20 while they were on the band trip for five days. It was
21 reported they knew the victim, they knew the perpetrator.

22 Actual notice.

23 With respect to Doe 1, no actual notice. There was no
24 indication of the name of the victim. There was no indication
25 of the name of the perpetrator. And -- and it has to be actual

1 notice to an appropriate person who has the authority to end
2 the discrimination. Then that person must respond with
3 deliberate indifference.

4 To the extent the C.V. report to Ms. Crouse is construed
5 to be notice to an appropriate person, it wasn't -- she's an
6 appropriate person, yes, but it wasn't actual notice because
7 she did not have the identity of the victim.

8 THE COURT: Suppose she didn't have the identity,
9 what should she have done? I mean, how do you not have the
10 identity? Someone reports this and says, Oh, can you give me
11 the name, or --

12 MS. KANE: Well, she --

13 THE COURT: -- do you make some further effort to find
14 out who, in fact, it was?

15 MS. KANE: Well, Your Honor, that may be a question
16 for a negligence theory, but with respect to Title IX, under
17 *Baynard*, under *Jennings*, under *Doe v. Fairfax*, you need actual
18 notice.

19 Mr. Maloney made a lot of arguments that had nothing to
20 do with notice of sexual harassment.

21 THE COURT: Can you willfully blind yourself -- you
22 are told there is an incident and you don't get the name, what
23 -- should you have to do something more? Does Title IX say you
24 don't have to do anything more until somebody gives you the
25 actual specifics?

1 MS. KANE: Two points to that, Your Honor, the first
2 being willful blindness, I think, comes up in the 1983 cases,
3 not Title IX; and the second being --

4 THE COURT: I don't know why that would be. I mean,
5 maybe it's never been argued there before. But the idea is you
6 are told -- there is actual notice of an event, without
7 specifics, and I am hearing you say, notwithstanding that, it's
8 not actual notice. Did she do anything?

9 MS. KANE: She did.

10 THE COURT: You got to tell me who these people are
11 so I can get it --

12 MS. KANE: Well, she referred it -- because there was
13 an allegation that it was sexual, she referred it to the school
14 resource officer, who was a police officer, to talk to the son
15 because what she's hearing is a rumor. She's hearing from a
16 parent of another student who heard of another student, and
17 that she had investigated by the school resource officer who
18 found out the person, talked to that person. That person
19 denied anything happened, and Officer Riddle reported back to
20 Crouse that person denied anything happened.

21 Now, Mr. Maloney has also referenced somebody threw the
22 notes away. It was that officer who retired, and when he
23 retired -- he's a County employee, not a Board of Ed
24 employee -- when he retired, all of his notes were put in the
25 dumpster, including any notes he had about Doe 1. But Doe 1

1 has admitted, in his response to request for admissions of fact
2 that are part of the record, he never told any MCPS employee,
3 he never told that he was victimized or who his perpetrators
4 were. No actual notice of Doe 1.

5 With respect to Does 2, 3, and 4, Mr. Maloney gave a lot
6 of argument about a lot of things, but he did not address the
7 standard, actual notice to an appropriate person who then
8 responded to that notice with deliberate indifference. The
9 Court asked him about prior events. He mentioned some prior
10 people. There was no mention in his argument, because there is
11 no mention in the record, that any prior alleged incident of
12 brooming -- and when I say "prior," it's after Doe 1 on August
13 1, '17 and before Does 2, 3, and 4 -- no evidence that anything
14 ever was brought to the attention of the principal, the
15 coaches, the administrators.

16 THE COURT: I am not sure -- Mr. Maloney, I need you
17 to engage with us.

18 Maybe I misunderstood his argument. I thought there was
19 some reporting --

20 MS. KANE: There was.

21 THE COURT: -- after -- well, let me just understand
22 what their position is. You are characterizing his position.
23 I am not sure that's what I heard him say before you go any
24 further.

25 MS. KANE: The report that I think that the Court was

1 confused about was in November of 2017, a report was made to
2 Casey Crouse, Ms. Hayes' report. That was the one without the
3 identity of the victim or the perpetrator.

4 THE COURT: Let me just hear his statement -- you
5 made a statement there is no actual notice between either
6 August 2017 or anything until October 31st, 2018. I didn't
7 understand him to be arguing that or saying that. Is that a
8 correct statement?

9 MR. MALONEY: It is not a correct statement, Judge,
10 what the Board just said. And I will read directly into the
11 record, because this is extremely important, On November 16th,
12 2017, the mother, F.H., met with the principal directly --

13 THE COURT: The mother of?

14 MR. MALONEY: The mother of a freshman, of a football
15 player who had been injured by an illegal hit. And she said, I
16 also want to complain because, quote, a freshman was forcibly
17 taken down, pinned down, and sodomized with a broom handle.
18 The Board says, At that point, it should have triggered a Form
19 230, but it didn't.

20 At some point, she got a school --

21 THE COURT: What are you reading from? I'm sorry.

22 MR. MALONEY: I am reading from our filing and also
23 Exhibit 43 and the deposition of Mr. Scriven, who worked in the
24 central office, at page 25, and the mother, herself's,
25 affidavit, paragraph 4, Exhibit 42. That's what she told the

1 principal. So the principal --

2 THE COURT: She told the principal directly?

3 MR. MALONEY: Told her directly. She sat in the
4 principal's office, and there was others there, and she signed
5 an affidavit saying she did, and she said in her affidavit, The
6 freshman was, quote, forcibly taken down, pinned down, and
7 sodomized with a broom handle. And I don't think this is
8 disputed by the Board, that she told the principal that.

9 Then she calls the police, and says, Well, I don't know
10 the name, sort of trying to put the police off, like it's not
11 really something to investigate.

12 Then she has -- she asks Riddle --

13 THE COURT: "She" being?

14 MR. MALONEY: The principal, Casey Crouse. Then she
15 asked Riddle, the school resource officer, to pull out and
16 begin interviewing people, including the alleged victim of the
17 2017 hazing, John Doe No. 1.

18 John Doe No. 1 testifies that when he got out -- when he
19 was brought out -- he was pulled out of the classroom by the
20 school resource officer. He then said that he gave a statement
21 and he provided the school resource officer, who was acting at
22 the direction of Ms. Crouse, with, quote, the name of the
23 student who was allegedly sodomized, and that the student --

24 THE COURT: Is this before October 2000 --

25 MR. MALONEY: Oh, this is back in 2017. This is

1 November 2017.

2 And he also provided the name of the -- and that the
3 student who was allegedly sodomized then, in turn, provided a
4 written statement about what happened in the sodomy. All of
5 those things happened. Okay? And we have an affidavit -- and
6 not only that --

7 THE COURT: You don't need to go further. I just
8 wanted to check --

9 MR. MALONEY: If I can just tell the Court two other
10 things about that?

11 THE COURT: Go ahead.

12 MR. MALONEY: Mr. Scriven, the central office
13 employee, documented all of this in his notes, and that's how
14 we know that, in addition to the affidavits of the mom and John
15 Doe No. 1. Scriven laid it out, but the Board has no record of
16 this. Why? Because the principal kept no records. She didn't
17 file the Form 235, which she is required by statute to do, and
18 Mr. Riddle, when he left in the spring of 2018, took his whole
19 file in his cabinet and put it in the dumpster.

20 THE COURT: Who was Riddle?

21 MR. MALONEY: He's the school resource officer acting
22 at the direction of Ms. Crouse. But Ms. Crouse was told
23 face-to-face about this, and she, even though she directed the
24 school resource officer to go in and they took statements from
25 both John Doe No. 1 and the other victim who had been sodomized

1 about what happened, and in response to that, they did nothing.

2 THE COURT: Stop. Stop. You have had your argument.

3 I just want to check you on that, Ms. Kane. When you
4 keep saying no actual notice, it isn't what I understood the
5 plaintiffs' position to be. Now, you still maintain no actual
6 notice in the face -- look, I am not saying you have to concede
7 the fact. The issue now is, is this triable? Is there a
8 genuine issue of material fact here? Not do you agree, but if
9 they put on that testimony, why doesn't it create a triable
10 issue?

11 MS. KANE: Your Honor, a couple of points on that.
12 Number one, with respect to Mr. Maloney saying that the Board
13 had no notes, he's reading from Scriven's notes. Those same
14 notes he referenced says that the school resource officer told
15 him and Crouse that the kid denied anything had happened.

16 Now, with respect to actual notice, Your Honor, we are
17 not looking for any disputes of fact, but we are looking for an
18 accurate record without embellishment and liberties. Right?
19 So with respect to that record, which is an exhibit the Court
20 can look at, and the case law, the case law requires actual
21 notice. Actual notice means not just that you are told about
22 an incident that might involve sexual harassment, but that you
23 are told the identity of the plaintiff.

24 THE COURT: I understand that. But you are saying
25 that doesn't create a triable issue when you are told there is

1 an incident, and, arguably, you don't follow up on it, that's
2 not enough? Arguably, that's not enough?

3 MS. KANE: No. That's enough for negligence. That's
4 enough for negligence. He made a great argument on negligence.

5 But the law on Title IX, to impute liability to the
6 institution for sexual harassment is actual notice, which
7 requires, under a litany of cases, including *Jennings, Doe v.*
8 *Fairfax, Baynard*, you must have actual notice. Most of the
9 time, it's plaintiff specific, but they will allow if it's the
10 same perpetrator.

11 What's important here is there is no actual notice that
12 involves -- that -- to the Board as to the victim or alleged
13 victim or as to the perpetrator.

14 THE COURT: Well, now, you have cases, then, that
15 stand for the proposition that when an appropriate person is
16 told that there has been an event and the specifics are not
17 handed to that person, they don't have to do anything further
18 because they don't have actual notice? Is that your read on
19 Title IX?

20 MS. KANE: Your Honor, that's what those cases --

21 THE COURT: I am asking you if you think that's what
22 the cases stand for. That's not what I heard Mr. Maloney say
23 the evidence is, but that's your view of what it is. He said
24 there were face-to-face meetings, there were statements made.
25 Now, there is no record of it, he says, because some of the

1 records were dumped.

2 MS. KANE: The only records that were dumped, Your
3 Honor, was the school resource officer who retired. He is a
4 County employee. With respect to the other records,
5 Mr. Maloney was reading from the Board's records which related
6 what happened in that meeting. It was called because
7 Ms. Hayes' son had other issues and concerns, and in the course
8 of that communication and meeting, this incident -- her hearsay
9 report about the assault of an unidentified student came up.

10 THE COURT: Well, I don't have to give you my full
11 opinion now, but I don't think I agree with you that there is
12 no evidence of actual notice and that it's enough to know about
13 a good possibility, and I have heard that there is arguably
14 more evidence than that that there has been an assault, and,
15 arguably, nothing happens in consequence before the events of
16 late October 2018.

17 MS. KANE: Well, that is the sum and substance of
18 what notice the Board had to an appropriate person prior to --
19 between Doe 1's incident and 10/31 incident.

20 THE COURT: Well, it may be enough, arguably.

21 MS. KANE: That's what there is, Your Honor.

22 THE COURT: That's their theory.

23 MS. KANE: And we would submit to the Court that it's
24 not sufficient under the case law.

25 I want to address some other things very quickly -- I

1 know Mr. Maloney -- I want my time back --

2 THE COURT: You went a little over on your first
3 argument so I gave you another ten minutes beyond what was
4 allowed, so we are kind of working within the limits.

5 MS. KANE: A couple of quick things. Let me just get
6 to the notes here.

7 And the other thing, Your Honor, is in response to the
8 notice for Title IX, whatever notice you have, then you have to
9 respond without deliberate indifference. And that somewhat
10 comes back to the Court's question, I think, of what do you
11 have to do? You respond, when it's an actual notice, without
12 deliberate indifference.

13 With respect to the incidents of other people, what's
14 important for Title IX -- Mr. Maloney gave a lot of arguments
15 about the football players being out of control and running
16 around in the hallways. That goes to negligence. Nothing to
17 do with Title IX. Title IX is basis of gender, sexual
18 harassment. It has to do with actual notice of sexual
19 harassment. And the other incidents are irrelevant for
20 purposes of the Title IX count.

21 With respect to the argument on *Cummings* and damages, he
22 cited one case, *Purdue*. That's the same case that the Court
23 changed their mind and the jury instruction says you don't get
24 emotional damages. That was --

25 THE COURT: But is it a fair statement that the read

1 on *Cummings* is not -- whether it applies to the Title IX cases
2 is not clear, there is no --

3 MS. KANE: Oh, it's clear. It's clear.

4 THE COURT: You are saying the Fourth Circuit has
5 clearly said that *Cummings* applies to Title IX and that there
6 may not be any emotional damages in a Title IX claim?

7 MS. KANE: It's clear from the cases that have come
8 after *Cummings* --

9 THE COURT: Fourth Circuit. Fourth Circuit.

10 MS. KANE: District court cases. And -- and the
11 circuits -- put it this way: *Doe v. Fairfax*, relied on by
12 plaintiffs, Mr. Ruff even mentioned it -- it's in both of our
13 binders because it's a recent case -- when they were ruling on
14 the motion in limine, I think they cited -- they have excluded
15 evidence of emotional distress damages, and I forget how many
16 cases they cited, but it was a litany of them, and they are all
17 finding that *Cummings* means you cannot obtain emotional
18 distress damages in Title IX.

19 THE COURT: Again, though, you heard -- you heard
20 Mr. Maloney talk about the issue that I raised, which is there
21 is going to be one line for emotional damages, which, if they
22 find negligence and they -- even if they find Title IX, same
23 number. Right?

24 MS. KANE: You know, it depends on where they find
25 liability. Yes, it's one number --

1 THE COURT: Well, sure.

2 MS. KANE: -- but the reason it's important to have --

3 THE COURT: Well, Title IX is only against the Board
4 of Education, isn't it? We are not talking about the other
5 defendants.

6 MS. KANE: That's correct, but the Board of Ed is
7 also in on negligence.

8 THE COURT: Yeah. So if they find against the Board
9 for negligence and they find against the Board on Title IX,
10 they still have only one line for emotional damages. Right?

11 MS. KANE: There is one line for damages. But let's
12 say that they find against the Board on negligence and in favor
13 of the Board on Title IX, then it's very important whether or
14 not they get emotional distress.

15 THE COURT: Well, couldn't I take that up at the end
16 of the case, which happens all the time? With regard to the --
17 the litigation caps by the State of Maryland, a jury comes back
18 where it comes back, and virtually, by consent, you say, That
19 exceeds the statutory cap, and it goes out over and above the
20 statutory cap, I mean, that's something that can get sorted out
21 afterwards.

22 MS. KANE: And the other cases, Your Honor, that have
23 addressed it, it's being thrown out, emotional distress
24 damages, in motions to dismiss, motions for summary judgment,
25 and being excluded from evidence.

1 THE COURT: I think, though, in a number of the cases
2 that you cited, that's the only damage that was sought. I make
3 a distinction -- I heard the argument made as well -- there is
4 a distinction between the invasion, or what I call the impact
5 or whatever of bodily integrity, and then the emotional
6 consequence of that.

7 MS. KANE: And that's compensatory damages. I am not
8 saying they couldn't make a claim of compensatory damage if
9 they have one.

10 THE COURT: Under Title IX?

11 MS. KANE: Under Title IX. But they cannot get
12 emotional distress damages.

13 THE COURT: You don't know what a jury is going to
14 do. You know, they come back all different ways, and you say
15 you can't give them -- you may confuse them at this point if
16 you say you can't give them emotional damages. The impact is
17 enough, believe me, it's bad enough, and whatever number we
18 want to give, we will give. That kind of thing happens.

19 MS. KANE: It has to be, like, a physical injury.
20 There has to be something -- or a loss of an educational
21 opportunity.

22 THE COURT: It's like being struck by an automobile.
23 You get hit, you are damaged physically. I mean, you know, you
24 are physically invaded. Whether you are bleeding or your bones
25 are broken, that's one way of looking about being invaded

1 bodily. Another is, you know, the humiliation, whatever it is,
2 the pain, the indignity. That's all part of what happened.
3 That's as bad as what comes after, I suppose.

4 Well, look, I think we have got enough. Finish with one
5 point. We need to take about a seven- or eight-minute break,
6 then we will come back and do the rest of the cases.

7 MS. KANE: The Court's indulgence just one moment.

8 MR. RUFF: Your Honor, could I just make one point?

9 THE COURT: What are you talking about now?

10 MR. RUFF: I want to make it very clear about the
11 notice issue as to John Doe 1.

12 THE COURT: Go ahead.

13 MR. RUFF: It's in our brief, in our --

14 MS. KANE: Your Honor, I have been interrupted.

15 THE COURT: Ms. Kane, I will give you a chance to
16 answer. Look, I am trying to understand where people are, and
17 there has been some issue on notice and notice as to Doe 1. Go
18 ahead.

19 MR. RUFF: Right. So the *Doe v. Fairfax* case, and
20 I'm sorry if I wasn't very clear --

21 THE COURT: I can read the case if that's what you
22 are concerned about.

23 MR. RUFF: It's just this one quote is that a school
24 system may be liable for pre-notice incidents of severe sexual
25 harassment.

1 THE COURT: Right.

2 MR. RUFF: That's what I am trying to get across to
3 the Court is that there --

4 MR. MALONEY: Pre-notice.

5 MR. RUFF: Yeah, pre-notice. There does not need to
6 be a precedence for there to be actual --

7 THE COURT: An actual notice, some --

8 MS. KANE: But there is a follow up to that, Your
9 Honor.

10 THE COURT: Okay.

11 MS. KANE: And the follow up is that they have to
12 have -- when the incident occurs and they get the actual
13 notice, they have to respond with deliberate indifference.

14 MR. RUFF: Correct.

15 MS. KANE: So it's a -- there is more to it.

16 THE COURT: But, again, this certainly is a case
17 which merits special interrogatories. I mean, you have got to
18 go through a lot of analysis on this. So there may be specific
19 interrogatories, without committing myself to any one at the
20 time, but it's about notice. With regard to Doe 1, what -- do
21 you find that one or more of the defendants had notice prior to
22 -- whatever the words are. We will look at those instructions
23 when we get there. And the jury answers yes, no, yes, no,
24 whatever they answer. If they answer no, no, no, and that's
25 what's required, then there is no notice that has been given,

1 and that may be the end of the -- the end of the story for Doe
2 1.

3 But right now, you know, I am hearing evidence that there
4 may be something that should be tried on this. I mean, you are
5 certainly free to argue there is no notice.

6 MS. KANE: Yes, Your Honor. And -- and to the extent
7 it's construed as notice, there is no deliberate indifference
8 because something was done.

9 Which brings me to Mr. Maloney bringing up an incident
10 that happened at Gaithersburg in February of 2018 and one in
11 Seneca Valley, both of which were -- they are different
12 victims, different perpetrators, different principals, but they
13 were each reported promptly, police were involved, students
14 were disciplined, so there is no deliberate indifference with
15 respect to those incidents.

16 THE COURT: You are getting into a lot of different
17 ways of which evidence would be presented in court, and right
18 now, it's hard for me to make a ruling now until I see how it
19 comes in. For example, there may have been a lot of publicity
20 about what happened at the other high schools.

21 One of the questions I asked earlier was: How did this
22 whole policy come into place? Why? Something must have
23 happened that provoked a decent response by Montgomery County.
24 It doesn't mean, because you make a decent response one time,
25 that it doesn't apply thereafter. But it may be that these are

1 the kinds of things that got discussed at board meetings. I
2 don't know. I don't have the whole record in front of me. But
3 those are the kinds of things that may well have put these
4 people on the alert one way or another. Until I see how it's
5 packaged, it's hard for me to say it doesn't come in, it's out
6 as a matter of law. I can't tell you that right now.

7 We do have to break, though, in a few minutes. If you
8 gather your thoughts, I will give you a minute-and-a-half when
9 we come back to finish this argument.

10 MS. KANE: Thank you, Your Honor.

11 THE COURT: Let's take about seven or eight minutes,
12 and then we will come back.

13 MS. KANE: Thank you.

14 (Recess taken from 3:43 p.m. until 3:57 p.m.)

15 THE COURT: Be seated, please.

16 Are we ready to go with -- well, I wanted to give you a
17 minute-and-a-half, Ms. Kane, to finish your thoughts on the
18 earlier argument.

19 MS. KANE: I will go as fast as I can, Your Honor.

20 Very quickly, one thing the Court had asked earlier I
21 just wanted to respond to, why did the Board of Ed have a
22 policy on sexual harassment, intimidation, and bullying?
23 Required by law. That's one thing that was a policy and for
24 best practices.

25 Getting back to the Title IX argument, with respect to

1 J.C.A., I wanted to respond that there was no deliberate
2 indifference when he came. Everybody gets a free and
3 appropriate public education. When he came, there had been
4 problems in his past. There were interventions that were put
5 into place -- these are in the record -- including he was
6 assigned to -- Ms. Tallapragada worked with him. He was
7 enrolled in the alternative one class called Connections, which
8 is students with certain skills that provides a small group
9 setting. He had weekly check-ins regarding his progress with
10 the school counselor. Behavioral interventions were
11 implemented, like twice weekly grades to his parent, adjusted
12 schedule, and football coach and SRO mentoring and monitoring.
13 And Miss Crouse and other employees also addressed incidents
14 involving J.C.A. -- or Ms. Tallapragada, I think it was,
15 involving J.C.A. in the fall of 2008 [sic]. He had only been
16 --

17 THE COURT: 2000 and?

18 MS. KANE: '18. He came to Damascus in September of
19 2018, so he was only there two months prior to the occurrence,
20 and there had been no sexual harassment of him while he was at
21 Damascus.

22 THE COURT: But, again, the allegations are there
23 were reports of misbehavior, bullying, including, but not
24 limited to, sexual assaultive behavior in a report that was
25 received and arguably either not read or not acted upon.

1 That's what I hear from plaintiffs' side.

2 So I do hear you say there were special programs put in
3 place for him. This is a question of security, I guess, as
4 much as anything, of protecting other students against possible
5 assaults, and not whether he was given alternative education
6 opportunities.

7 I mean, I assume that kind of evidence may or may not
8 come in at trial because it's not going to be enough for the
9 jury to decide, well, they were trying hard to give him a free,
10 appropriate public education, but meanwhile, he was battering
11 his fellow students. I mean, we will see. I mean, I really --
12 some of this depends on how it gets packaged at trial.

13 MS. KANE: With respect to the -- the sexual
14 harassment that was mentioned in middle school of the female,
15 that was in middle school. He was at Damascus High School. So
16 he had had no incident, no ongoing, current harassment at the
17 time of this occurrence. Yes, he had a lot of problems, but,
18 again, for Title IX standards, we are looking just at sexual
19 harassment at that time.

20 With respect to the last item, Judge, and I know you want
21 to move on, and that is with respect to actual notice to an
22 appropriate person, Mr. Ruff, himself, said the student said
23 this was a secret. That helps support why nobody knew.

24 THE COURT: Well, it's an interesting proposition, I
25 suppose. That's as much as I need to say at this point.

1 Again, it depends, in part, about how it gets packaged.

2 Hard for me to comprehend the whole record until the
3 evidence is in front of me and then say there is no basis on
4 which a trier of fact could reasonably infer that there was an
5 appropriate notice, appropriate -- and my view of actual notice
6 may be such that it's more comprehensive than your view now,
7 but we shall see. We shall see. All right. Thank you.

8 Let's go on to the next point. We are into 1983, I
9 think, with Defendant Sullivan as the director of athletics, of
10 system-wide athletics. Go ahead.

11 MS. KANE: Thank you, Your Honor.

12 With respect to the 1983 argument as to Sullivan, there
13 is one theory against him in Does 2 through 4, and that is
14 supervisory liability.

15 Under 1983, as the Court knows, that it's a claim --
16 imposes liability on state actors who cause the deprivation of
17 any rights, privileges, or immunities secured by the
18 Constitution, and the general rule is that state actors are not
19 responsible for student-on-student harassment under *Doe v.*

20 *Rosa.*

21 The supervisory liability requires that there be a -- a
22 supervisor and a subordinate. So the supervisor has to
23 supervise the subordinate, who then has to commit some wide and
24 pervasive unconstitutional conduct about which the supervisor
25 learns, and then the supervisor must respond with deliberate

1 indifference.

2 We don't have evidence here of that to support any claim
3 against Mr. Sullivan. First of all, he wasn't a supervisor.
4 He did not supervise the principal, the athletic coaches, and

5 --

6 THE COURT: What do you mean "he wasn't a
7 supervisor"? I mean, what do you say, he wasn't above them
8 responsible for what went on below him, or he wasn't hands on
9 looking at them each day? What do you mean?

10 MS. KANE: I mean he was not in their chain of
11 command.

12 THE COURT: Well, by reason of what? By reason of
13 some structural system that the County set up?

14 MS. KANE: By reason of the way that the hierarchy
15 works. I mean, the JV coach and the coach are supervised by
16 the athletic director and they also are supervised by the
17 principal, and the principal reports to -- in this case, Crouse
18 reported to Brian Scriven, who reported to the associate
19 superintendent, versus Mr. Sullivan is over here. He's not in
20 the chain of command.

21 THE COURT: Is the issue of supervisory liability
22 limited to what the defendants say is the hierachal structure,
23 or is it sort of de facto common sense who should have been
24 doing what, when, and where? You seem to be arguing that
25 because there is a structure in the Board of Education, I

1 guess, that says someone here is responsible; below them, not
2 responsible; below them, maybe responsible. I mean, that's
3 what I am hearing you say. And you say, Well, is that the end
4 of the inquiry?

5 MS. KANE: You have to have a -- in *Shaw v. Stroud*,
6 supervisory liability requires that a -- you have a state actor
7 supervisor and a state actor subordinate. Here, the tort
8 feasors are third-party student assailants. They are not state
9 actors. They are not in his chain of command. And so we have
10 a problem with the supervisory liability claim in that --

11 THE COURT: Supervisor liability. Okay. Go ahead.

12 MS. KANE: Sir?

13 THE COURT: Go ahead.

14 MS. KANE: Yeah. I mean, the plaintiffs have not
15 demonstrated either that he had a -- any subordinate employees
16 or that the -- the students in any way had to report to him.

17 THE COURT: That the students have to report to him?

18 MS. KANE: Right. Because for supervisory liability,
19 you have to -- in this case, the -- there has never been a case
20 that recognizes 1983 liability for student-on-student
21 harassment because --

22 THE COURT: What about physical assaults? I remember
23 I made that point earlier. You are getting so refined that you
24 can say it's so specific, this kind of assault, that there was
25 no notice and that, but what about -- suppose you had my

1 example, she had gangs beating on people in the hallway, you
2 just say, Well, that's nothing that we need to be concerned
3 about because, what, bodily integrity, you have a
4 constitutional right here, and if you are indifferent to that,
5 why wouldn't there be liability?

6 MS. KANE: The standards are that the -- there must
7 be knowledge of -- that a subordinate -- conduct engaged in by
8 a subordinate which conduct poses a pervasive and unreasonable
9 risk --

10 THE COURT: But the subordinate is the -- are the
11 people in the defensive hierarchy, not the students. Right?
12 Did I understand --

13 MS. KANE: Yes. But here, the people in the
14 hierarchy were not the tort feasors. The students were. So
15 where is the conduct coming from? The criminal conduct is
16 coming from the students. When you are looking at supervisory
17 liability, then he has to supervise somebody who creates -- who
18 commits a wrong. So what is the wrong of his alleged
19 subordinate? Number one, he didn't have subordinates, and
20 number two, the tort feisor here were the students.

21 THE COURT: That's where you are losing me. Why are
22 the students in the equation? These are supervisors -- these
23 are people below Sullivan who were not on guard, so to speak,
24 against possible physical assaults by students. The students
25 aren't the people that they are -- well, they are supervising

1 them in a sense, but supervisory liability has to do with who
2 is supposed to be overseeing the students, not the students
3 themselves.

4 MS. KANE: Well --

5 THE COURT: You are confusing supervising the
6 students with supervisory liability.

7 MS. KANE: But there has to be evidence that somebody
8 he supervises is engaged in conduct --

9 THE COURT: Right.

10 MS. KANE: -- that poses a severe and --

11 THE COURT: Well, that's what I understand the law to
12 be, and that's the way we will understand supervisory
13 liability.

14 MS. KANE: Yes. So that's the standard. Applying it
15 to our facts, he didn't supervise anybody, so he gets summary
16 judgment on supervisory liability.

17 THE COURT: He didn't supervise the students is what
18 you are saying?

19 MS. KANE: He did not supervise the students.

20 THE COURT: Okay.

21 MS. KANE: He did not supervise Wallich. He did not
22 supervise Colbert.

23 THE COURT: Well, that's what your argument is. The
24 argument contrary is that he did or should have done it.

25 MS. KANE: There is not evidence in the record that

1 he did or should have done.

2 THE COURT: I will hear argument on it, but I --
3 that's why I asked you is it all based on what the structure is
4 that the Board of Education gives to each of these respective
5 positions in the hierarchy, or is it based on de facto what
6 they -- well, common sense or otherwise what they should be
7 doing?

8 MS. KANE: Their theory against Sullivan is that
9 supervisor is loosely defined, and they claim he is responsible
10 for implementation of policies and procedures which govern MCPS
11 athletics, including locker room supervision.

12 THE COURT: Right.

13 MS. KANE: In essence, they are trying to make a
14 *Moneill's* claim against him, and this is in his individual
15 capacity. He is a State employee. The State has been
16 dismissed on the 1983 claim. When I stay "the State," I mean
17 the Board of Ed because it's not a person for purposes of 1983.

18 So their theory against him -- they are not saying he has
19 subordinates. They are claiming some -- they cite to a case,
20 *Camilo-Robles*, and they claim that it means a supervisor can be
21 a person responsible for the implementations of policies and
22 procedures which are relevant to the civil rights violations.

23 The case was not based on that holding. In that case, it
24 involved a schizophrenic police officer with a history of
25 violent behavior, including assaults and 18 disciplinary

1 concerns. The police officer was suspended and expelled. He
2 moved for reinstatement, had a psych eval, was reinstated, and
3 given his weapon.

4 Subsequent incident, he was wrongly assaulted -- oh,
5 subsequently, he wrongly arrested and detained a plaintiff who
6 filed suit against the psychiatrist who declared him fit for
7 duty and various supervisors of the police officer. This is
8 the case they rely on for this loose supervisor. They are
9 people in the chain of command. They were above this police
10 officer. It was a unit director of the police department, the
11 commander, and the superintendent above him.

12 Compared to the facts in our case with Mr. Sullivan, he
13 didn't supervise Wallich, Colbert, Crouse, or Doody. They were
14 not under him. He was the system-wide director of athletics
15 who would circulate policies. The other people would take
16 those policies, the policies from the Board. The Board's
17 policies, he'd disseminate, they would pass them down, and then
18 it would be up to Doody and Crouse to supervise Colbert and
19 Wallich.

20 THE COURT: No. I understand that's your theory. I
21 understand that.

22 MS. KANE: There is no -- there is no -- invite them,
23 Your Honor, to tell you where in the record it says something
24 else because -- here we go. There is -- there is nothing there
25 that puts him to be a supervisor.

1 THE COURT: And you are saying he's not a supervisor
2 because that's the way the Board of Education structures his
3 responsibility. Right? That's what you are --

4 MS. KANE: Yeah. That's true.

5 THE COURT: Okay.

6 MS. KANE: I mean, that's how it is. And he gets
7 qualified immunity. Even -- I mean, first, there is no
8 constitutional violation. Then, to the extent the Court finds
9 somehow that he was a supervisor and he somehow violated the
10 plaintiffs' rights because students underneath Colbert or
11 Wallich criminally assaulted the plaintiffs, he's entitled to
12 qualified immunity because it was not clearly established at
13 the time of this incident that he could be constitutionally
14 liable for non-subordinate conduct of -- of students, of third
15 parties.

16 THE COURT: Including physical assaults? He could
17 not be liable for physical assaults? Leave aside specific
18 brooming incidents, even though I am sure the plaintiff may
19 argue there was that, but there is no constitutional right to
20 bodily integrity? Maybe -- depending on what issue you are
21 talking about, maybe there isn't, but --

22 MS. KANE: He did not -- he did not -- excuse me,
23 Your Honor. I didn't mean to interrupt you.

24 THE COURT: That's all right. Go ahead.

25 MS. KANE: He did not violate the bodily integrity of

1 the plaintiffs, nor did his alleged subordinate violate --

2 THE COURT: But it's a supervisory liability claim.

3 In a supervisory liability claim, does he have to have been the
4 one who directly did it, or is there -- is he in the chain of
5 command where someone down the line did not act properly and he
6 is responsible for them?

7 MS. KANE: There must be that employee/subordinate --
8 the supervisor/subordinate relationship. It's nonexistent
9 here.

10 THE COURT: Okay.

11 MS. KANE: The Court's indulgence.

12 So that would be the first ground. It's never been
13 recognized. It's, therefore, not clearly established that
14 someone in his position --

15 THE COURT: I am allowing that this argument that you
16 are making about qualified immunity is going to apply across
17 the board to the next counts as well?

18 MS. KANE: Yes.

19 THE COURT: I don't know that you are going to need
20 to repeat it. You are going a little over your time here, but
21 I don't need to hear the same argument again on qualified
22 immunity. We can engage on that now, and we will go back and
23 forth and see where we are.

24 MS. KANE: Yeah. Well, it certainly applies to him a
25 little differently because he was not a subordinate. He had no

1 subordinates. Crouse had subordinates. So that one argument
2 applies just to him and not to Crouse. But as far as the
3 analysis --

4 THE COURT: The others are concerned...

5 MS. KANE: -- and that there was, number one, no
6 constitutional violation, two, if there was, it was not clearly
7 established, and, therefore, there was no Fourth Circuit,
8 Supreme Court, or Maryland Supreme Court case that said he
9 could be liable for the violation of a student's right to
10 bodily integrity when the violation occurred from a
11 non-subordinate, third-party student.

12 THE COURT: All right. Understood. All right.

13 Mr. Maloney.

14 MR. MALONEY: Your Honor, I am a little surprised by
15 the Board's argument because Mr. Sullivan, in his deposition,
16 testified to exactly the opposite as to his duties. In his
17 deposition, at page 168 and 69, he testified that he had direct
18 oversight over Montgomery County Public School athletic
19 programs, including whether supervision -- supervision policies
20 are being met and complied with. He said that the defendants
21 were bound to follow his directives regarding supervising and
22 training, supervising policies, and requirements to coach.

23 He said he has 12 other specific responsibilities that he
24 has the ability to enforce, and I will just talk about a couple
25 of them in a minute. He said he had the ability and the

1 authority to impose discipline. He gave as an example, in
2 2019, he found that Coach Wallich had conducted an illegal
3 practice, so he decided as discipline that year that Coach
4 Wallich would forfeit one game that year.

5 But it was more than just forfeiting games. He also, of
6 one of his 12 responsibilities, had the ability to certify
7 coaches or to decertify them, and if they -- and if they were
8 not certified, then they could not coach, and he had the right
9 to revoke or modify their certification and oversee them.

10 He also testified that there were basically sort of two
11 dotted lines, sort of dual lines of authority were sort of the
12 administrative principal and the administrative supervision of
13 the building, but he had the direct supervision of the athletic
14 program and everything that was involved in athletics, and in a
15 sense, Coach Wallich, Mr. Doody, and Coach Colbert all reported
16 to him.

17 He also was responsible for setting in and imposing the
18 training requirement here. And, significantly, one of his 12
19 responsibilities was to establish safety protocols for student
20 safety and to ensure the direct safety of all student
21 participants, and also to integrate and ensure the compliance
22 of all Montgomery County state, local, and national laws and
23 training, and to make sure that there is compliance with
24 procedures with respect to student safety.

25 Now, this is significant in terms of what our factual

1 allegations are, is that there were a number of breaches.
2 First of all, he was aware, and admitted it, that he was well
3 aware of the November 2017 report on the 17th, that on that
4 day, Mrs. H went in and told the principal that there had been
5 the anal attack of a freshman in the locker room. He knew that
6 the Safe Schools Act, which is a legal requirement, required
7 the filling out of a Form 2-35, and once that form is filled
8 out and once that form is then sent, it triggers an
9 investigation. It's actually Form 230-36.

10 That's an extremely significant form. It's required to
11 be submitted both by regulation of Montgomery County and by the
12 state statute. Everybody acknowledges it's there. It was
13 never filed by Ms. Colbert [sic] ever even though she was
14 legally required to do it, and Mr. Sullivan was required to
15 ensure --

16 THE COURT: You said -- by Ms. Crouse, you mean?

17 MR. MALONEY: By Ms. Crouse. Thank you for that.

18 And Mr. Sullivan was aware that it wasn't filed because
19 it's supposed to go up to him and others through the chain of
20 command so that there can be accountability and an adequate
21 investigation. But they violated the Safe Streets Act; they
22 violated their own regulation; they violated the requirement to
23 submit that form even though they had direct statements that
24 this occurred and even though two of our -- two witnesses have
25 now said that they gave statements to the resource officer

1 about the anal attack that occurred, and, of course, none of
2 those records are there.

3 There is no Form 230-36, which state law requires. There
4 is no file at all other than the surviving memo of the central
5 office worker who confirms what our witnesses have said in
6 affidavits as well. So, he clearly is a supervisor, and it
7 would be hard to say he was not.

8 In addition to his breach there, he was well aware, as
9 the supervisor, of what happened on February 8th, 2018 at
10 Gaithersburg and on September 7th, 2018 at Seneca. All of
11 these situations involved unsupervised locker rooms.
12 Montgomery County had an absolute policy that there can be no
13 unsupervised locker rooms at all. But it was clear in Seneca,
14 it was 20 minutes. In -- at Damascus, it was never. Never.
15 Never. And at Gaithersburg, there was a lengthy
16 non-supervision period. It was his obligation as a supervisor
17 to ensure people took action.

18 And finally, with respect to his supervisory liability,
19 he had responsibility to ensure that his subordinate coaches,
20 Wallich and Colbert, became -- should undergo training. They
21 did not. There was a package training program that all coaches
22 were required to take. In that package training, they talked
23 about hazing. They talked about the risk of brooming attacks
24 in other jurisdictions, citing New Mexico. They talked about
25 the need for locker room supervision. It was an annual

1 requirement that they each take training. Neither Wallich nor
2 Colbert had the training that year in 2018. And Mr. Sullivan
3 acknowledged that on his computer, he could track whether they
4 did or didn't, and he knew that they didn't, or had
5 constructive knowledge, and did absolutely nothing about it.

6 THE COURT: Was this where the consequence being they
7 could not coach if they had not completed?

8 MR. MALONEY: Correct. That turned out to be a paper
9 tiger because -- and he kept right on his computer who had it
10 and who didn't, and even though they didn't, both of them were
11 allowed to go out and coach.

12 Ironically, the Montgomery County Board, in the
13 investigation of this, reprimanded Wallich and removed Colbert,
14 saying that they failed to develop and have an adequate
15 supervisory program for the student athletes, especially in the
16 locker room, and they detailed for some reasons why their
17 failures were there and why they should be disciplined here.
18 All of those subjects for which they were disciplined were
19 matters to which they were subject to mandatory training and
20 which they were not enforced. And those were also breaches of
21 supervisory liability of Mr. Sullivan.

22 And finally, to close on the issue of qualified immunity,
23 it is obviously an extraordinary assertion when a Board of
24 Education comes into a federal court and says that the invasion
25 of bodily integrity is not -- or was not in 2018 a known

1 constitutional right. That is legally incorrect and morally
2 indefensible. Everyone knows that you cannot allow your
3 student athletes or anybody to be raped, and that's what
4 occurred here. And to suggest that this was not a known right
5 in 2018, as they did in their papers, is quite extraordinary.

6 THE COURT: Are we through on that?

7 MS. KANE: I have rebuttal.

8 THE COURT: There is a rebuttal to that?

9 MS. KANE: Yes, Your Honor. Very briefly.

10 A couple of quick points to Mr. Maloney, and, that is,
11 you know, he -- he takes liberties with the record, with things
12 that are not there. The -- Sullivan was not responsible for
13 compliance with the training. No evidence that --

14 THE COURT: Well, that's an easy enough thing to
15 prove. Did he say on deposition that he was? If he said that,
16 I mean, I am not sure why you are making a contrary
17 representation?

18 MS. KANE: Well, I think that what Mr. -- I think
19 Mr. Maloney was reading from his brief, not from the exhibits,
20 and that -- the record says, Prior to July 2018, principals or
21 their designees were tasked with ensuring that required
22 training was completed by MCPS staff, and athletic directors
23 were responsible for ensuring that coaches took the required
24 additional training. That was Sullivan's testimony.

25 THE COURT: Okay.

1 MS. KANE: Now, he's not the athletic director. He's
2 not the principal. He's not the coach.

3 THE COURT: Did he establish the policy, that he's
4 the one who --

5 MS. KANE: He disseminated the policy.

6 THE COURT: No, disseminated. Where did the policy
7 come from?

8 MS. KANE: The Board.

9 THE COURT: And he -- it had to do with supervision
10 of potential hazing type activity. Correct?

11 MS. KANE: Yes. There were -- yes. There were --
12 there were plans on that, and then there was the State
13 policy -- the State Department Board policy against sexual
14 harassment, bullying, and intimidation that we have referenced.

15 And with respect to Mr. Maloney's claim that he
16 disciplined -- that forfeiting a game was -- that's not
17 discipline to Mr. Wallich. I mean, and with respect to --

18 THE COURT: Well, let's just take the physical
19 attack, and you can say the subset of that is sexual attack or
20 whatever. Did he not issue a policy to that effect, and then
21 he said it's up to the principal to implement and so on down
22 the line? Am I missing something?

23 MS. KANE: Yeah. That was not -- he gave the Board's
24 policy --

25 THE COURT: Okay.

1 MS. KANE: He relays the policy of the Board to the
2 chain -- to the principals to give to the athletic directors,
3 to give to the coaches. He's over here. They are in a line
4 here.

5 THE COURT: Okay.

6 MS. KANE: He doesn't supervise them.

7 THE COURT: What about the training program, is he
8 the one who says that in order to be able to coach, you need to
9 do these programs? Is he the one that says that?

10 MS. KANE: That would be a Board policy, but he
11 passed out the memo saying people should be -- should have the
12 training, yes.

13 THE COURT: He's got -- all right. And then he knows
14 who has and has not completed it?

15 MS. KANE: There was a new system that came into
16 place in 2018 in the late summer where people could get access
17 -- it was still being implemented, so whether or not he
18 actually had access prior to October 31, 2018 is unclear.

19 THE COURT: But would he have had at -- sometime in
20 that time frame, even after it -- I am just trying to get an
21 idea of when he -- look, the question is: Did he have the
22 responsibility to say there should be training and to follow up
23 and there wasn't? Yes or no?

24 MS. KANE: The Board had a policy that there should
25 be training. To follow up and make sure that that was

1 implemented was done by the principal and the athletic
2 director. There is about 23 high schools, and he's one
3 athletic director not only for the high schools, but he's
4 system wide. So it was within the individual school that they
5 made sure that training was complied with.

6 THE COURT: Okay.

7 MS. KANE: So it wasn't --

8 THE COURT: I am hearing that argument. Let me --
9 there is one thing I am a little --

10 MS. KANE: But real quickly, Your Honor --

11 THE COURT: Before you leave that, you made an
12 argument like what this really is is a *Mone11* claim --

13 MS. KANE: Yes.

14 THE COURT: -- against the school board, I guess, and
15 nobody should be individually liable because that's really
16 what's going on here; is that a fair statement?

17 MS. KANE: Yes, because he was sued in his individual
18 capacity here because the claim against the Board of Ed -- the
19 Board is not a person for purposes of 1983.

20 THE COURT: The Board is not sued on Title --

21 MS. KANE: It was. It went out on a motion to
22 dismiss in your order.

23 THE COURT: Oh, okay.

24 MS. KANE: So it's gone. So to the extent that they
25 are trying to make a *Mone11* claim against him, it should also

1 go out.

2 THE COURT: Well, I am not sure what you are saying.
3 You know, it's a fiction. You go against individuals instead
4 of the entity, and you basically say, They are doing what you
5 would like to say against the entity but they are doing it in
6 their individual capacity. You are saying, Well, he wasn't
7 acting in his individual capacity; he was acting, I don't know,
8 all these people were, I guess, in their official capacity?

9 MS. KANE: But their complaint is about policies and
10 implementation of policies, so their complaint is about a
11 policy, custom, practice, procedure, which would be like a
12 *Mone11* complaint.

13 THE COURT: But even if his policy was the same as
14 the Board's policy, it's still his policy, isn't it? It's
15 still a policy he's promulgating? You are saying he can't be
16 sued because he's just passing on a Board policy? I need to be
17 clear with you on your argument. I am not challenging you on
18 it, at least not at this point. I am trying to understand. He
19 has got qualified immunity because it's not his policy; he's
20 just promulgating what the Board sets as policy. Is that a
21 fair statement of where you are?

22 MS. KANE: He has -- he has qualified immunity for,
23 you know, not being a supervisor as well.

24 THE COURT: Well, we have talked about that. You
25 don't need to go back to it.

1 MS. KANE: But in answer -- I'm sorry. Could you
2 repeat your question, Judge?

3 THE COURT: I think when you talk about he's -- he's
4 really -- this is really a *Moneill* claim and somehow the
5 plaintiffs are trying to get around that, and they are really
6 going after the Board in the person of Sullivan --

7 MS. KANE: Yes.

8 THE COURT: -- because he didn't make the policy, he
9 just passed it along; is that a fair statement of what you are
10 saying?

11 MS. KANE: Yes.

12 THE COURT: Okay. That's what I want to understand.

13 MS. KANE: Okay.

14 THE COURT: I will come back to Mr. Maloney on that
15 because I am not sure how you are arguing that. I mean, I
16 don't think that really is the law, just because he's -- they
17 have a policy and he has a policy, that somehow you can't go
18 after him because their policy is -- is protected. I don't
19 know that his is. That's what I am hearing you say. His --

20 MS. KANE: I mean, he's disseminating the Board
21 policy.

22 THE COURT: Well, all right. I am not sure that I
23 have seen that argument before, that because somebody is sued
24 individually, is relying on a policy that the County or
25 whatever the municipality has, that somehow he can't be sued

1 because he's really transmitting their policy. I haven't quite
2 seen that argument, and maybe you have got some merit to it.

3 I mean, I'd like to hear the response to it because I am
4 not familiar with what you are saying, that you can get -- you
5 get immunity because your employer has -- because your superior
6 has immunity, because your municipality has immunity. I mean,
7 that's the whole idea of the individual liability fiction.

8 But Mr. Maloney, do you want to answer that? I don't
9 want to find myself arguing plaintiffs' case, but I need to
10 understand clearly where defendants are coming from.

11 MR. MALONEY: Your Honor, I think Mr. Sullivan would
12 be surprised to see how much he's been demoted by the Board in
13 this courtroom today. He's being made out as sort of the
14 mailman who is just delivering policies from the Board.

15 He is the training guy. He testified at some length, and
16 he has written documents about his duties. It's his job to
17 develop and implement the required system-wide training. He
18 develops the safety -- that's item one.

19 Item No. 2: He is the one who establishes the safety
20 protocols and procedures that require direct supervision.

21 No. 3: He sent out memos, including one that July,
22 interpreting what they are and telling people what the
23 requirements are.

24 No. 4: He is supposed to integrate all Montgomery
25 policies and national laws about student safety and to make

1 sure the staff knows and complies with that.

2 Next: He is to certify individual coaches and athletic
3 directors and set expectations for them, and he has the
4 authority to revoke those certifications.

5 Next --

6 THE COURT: I have heard you on this before.

7 MR. MALONEY: There is more.

8 THE COURT: Stop. Stop. The issue really is what do
9 you do with a *Mone11* type claim? I have heard her make this
10 argument somehow, that this is really a *Mone11* claim against
11 the Board, and, therefore, Mr. Sullivan should also be
12 protected by it.

13 MR. MALONEY: Well, our position, of course, was that
14 the Board may have *Mone11* liability as well, but that doesn't
15 preclude individual supervisory liability where an individual,
16 quote, has responsibility for various -- for -- for
17 administration and implementation and enforcement of policy and
18 violates those duties that result in a constitutional breach.

19 THE COURT: I don't want to take any more time.

20 Let's finish quickly on this point, Ms. Kane, if you
21 would.

22 MS. KANE: Just what Mr. Maloney was reading from was
23 a job description not in effect at the time of the incident.

24 One other -- we had cited *Wilkins v. Montgomery* in
25 defense of Mr. Sullivan on this motion under 1983. In that

1 case, the Court writes, Finally, appellee's job duties were
2 patently administrative in nature, and they included providing
3 direction to and oversight of the operations, assessing,
4 developing, monitoring, and evaluating the clinical and
5 forensic operations of the hospital, and providing
6 administrative and operational supervision to medical or
7 clinical departments. Nowhere is there a requirement that she
8 have supervision over the security or monitoring of the
9 patients in Ward 39-8.

10 THE COURT: Aren't you just saying that these are
11 issues of fact that can be argued to a jury? Not that he's
12 right, necessarily, but he's got an argument to make based on
13 what, apparently, he says, Sullivan concedes that he has
14 responsibility for, and you are saying, Well, he really
15 doesn't. And you can make that argument. But right now, you
16 want me to stop any case -- any claim against him based on your
17 view.

18 MS. KANE: Well, assume, then, for purposes of this,
19 if there is a dispute of fact, we go back to he's not a -- he's
20 not a supervisor and he has qualified immunity.

21 THE COURT: I hear that argument. Don't need to go
22 into it again. I understand your argument.

23 MS. KANE: And for those reasons, Your Honor, he
24 should be granted summary judgment on 1983.

25 THE COURT: All right. Let's move on to Ms. Crouse,

1 1983.

2 MS. KANE: And Mr. Sullivan was only on Does 2, 3,
3 and 4.

4 Now, Ms. Crouse is in on two different theories. She's
5 under state-created danger on Does 2, 3, and 4 and supervisory
6 liability, and on Doe 1, she's in just -- I'm sorry, she's not
7 in on Doe 1.

8 MR. RUFF: That's correct.

9 MS. KANE: I'm sorry. It's Mr. Wallich that's in.
10 My apologies, Your Honor. We are just on 2, 3, and 4.

11 THE COURT: Let me just ask you to shorten this a
12 bit, though, because we are getting to a late time. Is your
13 argument -- are you arguing that Ms. Crouse had no supervisory
14 liability?

15 MS. KANE: She was a supervisor.

16 THE COURT: Okay. So you are not arguing that she
17 didn't --

18 MS. KANE: I am arguing that there was -- she has --
19 she would have qualified immunity with respect to the
20 supervisory liability claim because --

21 THE COURT: Okay. I just want to clarify that you
22 are not arguing that she wasn't a supervisor?

23 MS. KANE: No.

24 THE COURT: Okay. And let me -- before you get -- I
25 need to sort of keep track on all these different pending

1 motions.

2 Mr. Ruff, as I understood the 1983 as to Sullivan, you
3 are not opposing that. Is that correct?

4 MR. RUFF: That's correct. We are only pursuing
5 supervisory liability against Coach Wallich.

6 THE COURT: Okay. Well, whatever was said as to
7 that. We are back on --

8 MR. RUFF: That's as to Doe 1.

9 THE COURT: All right. With regard to Count Nine,
10 though, which is --

11 MR. RUFF: That's as to Ms. Crouse.

12 THE COURT: Ms. Crouse. You are not opposing that?

13 MR. MALONEY: No. Those are Does 2, 3, and 4.

14 THE COURT: And they are opposing as to state-created
15 danger and supervisory liability. And what I asked you was:
16 Are you arguing that she is not a supervisor? You are saying
17 she's entitled to qualified immunity, I know, but...

18 MS. KANE: I am saying she is a supervisor of Wallich
19 and -- Wallich and Colbert, but --

20 THE COURT: Not Doody?

21 MS. KANE: And Doody as well.

22 THE COURT: Okay.

23 MS. KANE: And Doody. But with respect to
24 supervisory liability, you have to have a subordinate employee
25 who then engages in conduct that poses a severe and --

1 THE COURT: Well, isn't that what we just talked
2 about with Sullivan? Same analysis, isn't it?

3 MS. KANE: Yeah, severe and unreasonable risk of
4 constitutional injury.

5 THE COURT: Okay.

6 MS. KANE: The thing here is that the constitutional
7 injury was caused by third-party students, criminal assault.
8 And there -- all the cases require, for supervisory liability,
9 that there be an employment relationship, so, for example, if
10 it's principal, assistant principal, or a teacher abuses -- you
11 know, a principal supervises a teacher who abuses the
12 plaintiff.

13 But here, we have Crouse supervising other subordinates
14 who are supposed to supervise the locker room and then we have
15 criminal activity undergoing under their watch, and there is no
16 case that requires -- it wasn't clearly established at the time
17 of this occurrence that she had a duty to detect and prevent
18 her -- she had a duty to make sure that her subordinates
19 detected and prevented third-party criminal assault.

20 THE COURT: There is no proposition that finds any
21 authority -- there is no authority for that proposition? She
22 had no, what, constitutional duty or --

23 MS. KANE: There is -- the cases say, for supervisory
24 liability, you have a supervisor, you have a subordinate, the
25 subordinate causes harm to the plaintiff. We don't have that

1 here. We have the supervisor. We have the subordinate. The
2 subordinate is alleged -- is supposed to be supervising the
3 locker room, and the student-on-student harassment or sexual
4 assault occurred, but the cases -- the students are not in the
5 chain of supervisory liability, so it doesn't fit into the
6 framework.

7 THE COURT: You are really losing me on this
8 argument, I got to tell you. The students are supervised by
9 these people up the line, and if they create a risk of serious
10 bodily harm to them, the argument is they would be liable. Not
11 that the students are in the chain of anything. I mean, the
12 risk is created, arguably, by the failure to act or the act --
13 the affirmative action taken by the people up the line. I am
14 not sure I follow what you are saying about the students.

15 MS. KANE: Well, they are the tortfeasors here. And
16 I know that the Court is saying, Well, they have the -- the
17 subordinates have a duty to supervise them, but the case law
18 does not impose -- we are talking about state -- we are talking
19 about 1983. You need misconduct by a state actor subordinate,
20 not misconduct by the student.

21 THE COURT: The misconduct of the state subordinate
22 is the failure to supervise the student, or the -- the --

23 MS. KANE: And that is --

24 THE COURT: -- the actions taken where that student --
25 which create the risk?

1 MS. KANE: And it's not clearly established in the
2 Fourth Circuit that that is a constitutional violation.

3 THE COURT: Okay. I understand.

4 MS. KANE: It's not -- and I'm sorry, Your Honor, if
5 I have not articulated that clearly. My apologies.

6 THE COURT: All right.

7 MS. KANE: That was our argument. And, again, with
8 Crouse, she is with respect to Does 2, 3, and 4.

9 THE COURT: Let me hear from Mr. Maloney. We are
10 moving along pretty well. Mr. Maloney, briefly.

11 MR. MALONEY: Your Honor, that's a pretty
12 extraordinary argument. The Board is saying that it was not a
13 known right, or -- or that principals were not on notice in
14 2018 in the State of Maryland or in the Fourth Circuit that
15 they had to exercise supervisory responsibility and other
16 duties in a way to prevent students from being assaulted or
17 raped. That's pretty extraordinary.

18 It's also a proposition that has been repeatedly rejected
19 by our Courts. The Fourth Circuit, in *Doe vs. Fairfax*, cited a
20 long list of cases where principals and others have had
21 responsibility with respect to making sure -- we are talking
22 about student-on-student sexual assault. We have cited in our
23 papers the Seventh Circuit *T.E. v. Grindle* where the principal
24 covered up and did not engage in active investigation --

25 THE COURT: Are these 1983 cases?

1 MR. MALONEY: These are 1983 cases. This was 1983
2 liability.

3 And Your Honor, *Grindle* is not an outlier. There is
4 dozens and dozens of these cases. There is no case that has
5 ever heard, nor have they cited one, that said it was not a
6 known right for a principal to exercise supervisory
7 responsibility to make sure that their students didn't get
8 raped. And, in fact, it has been the law in the State of
9 Maryland for 50 years that the principal and the staff stand *in*
10 *loco parentis*, must stand in the shoes of the parents to ensure
11 student safety in all matters, in all respects.

12 So it's quite extraordinary to say a principal in
13 Montgomery County in 2018 had no reason to know they were
14 supposed to prevent kids from being raped, and, therefore, they
15 should be immune.

16 This is student on -- and, again, this whole concept
17 because they weren't supervising the student -- this is
18 student-on-student rape where they had a supervisory
19 responsibility.

20 With respect to Ms. Crouse, we are arguing not only
21 supervisory responsibility, but also that she fostered and
22 indeed was the moving force in state-created danger. And we
23 argued that it happened in three different ways.

24 First of all, although she was under a legal -- although
25 she was under a requirement from the Board and a regulation

1 that locker rooms must be supervised all the time and that
2 students who would be in a locker room must be supervised, when
3 she came to Damascus, she deliberately removed that supervision
4 and made sure that for that one hour, from 2:30 to 3:30, that
5 instead of the JV football team being safely supervised by an
6 adult in a study hall, that they were allowed to be in the
7 locker room by themselves and elsewhere in the building.

8 She made that affirmative decision to remove that
9 guardrail and to create that state-created danger despite the
10 strong opposition of her vice-principal, her director of
11 security --

12 THE COURT: But has it ever been that -- has that
13 concept ever been applied outside of, like, a prison custodial
14 setting? Has it ever been applied to a school?

15 MR. MALONEY: Oh, all the time. There is a lot of
16 state-created danger cases involving the schools that are out
17 there. This is not an outlier in terms of that. Okay? And
18 it's particularly so because what happens here is that they are
19 created -- they are creating -- what happens here is they are
20 creating the risk here.

21 I direct the Court's attention to the Sixth Circuit, just
22 two years ago, in *Garza*, 972 here. Again, principal failed to
23 investigate and allowed abuse that was going on that the
24 principal should have known was happening.

25 And then with respect to Mr. Abedi --

1 THE COURT: That is considered state-created danger?

2 MR. MALONEY: That one was supervisory liability.

3 THE COURT: Well, I understand you are arguing that.

4 I am asking about state-created danger.

5 MR. MALONEY: State-created danger would be Tenth
6 Circuit, *Monell*, 186, where a plaintiff claims that a high
7 school principal refused to take action to control a student's
8 sexual harassment of another. That was a 1983 claim that was
9 there.

10 And the problem here with Mr. Abedi is that she was on
11 notice. She had a huge file saying that he --

12 THE COURT: J.C.?

13 MR. MALONEY: Yeah, J.C. My apologies.

14 -- that J.C. had a huge history; that he was a danger to
15 everyone that came into the building in Clarksburg to the
16 extent that he required full-time, 100 percent one-on-one
17 supervision all day, and she made a deliberate decision to
18 reject the recommendations of her SRO -- her new SRO who came
19 there who had been at Clarksburg and the people -- the
20 personnel person who came from Clarksburg who told her how bad
21 this would be, and it was.

22 And as Mr. Wallich reported, they got complaints every
23 single day, including assault on teacher, assaults on students,
24 assaults on others. So this was something -- this was not a
25 situation of her supervisory negligence. She was the moving

1 force who removed these safety guardrails that Clarksburg had
2 put in, and very affirmatively made the very dangerous decision
3 to say, We are going to give him a fresh start. That was a
4 constitutional violation because it created a danger to the
5 plaintiffs here, as well as, frankly, everybody else in the
6 building.

7 So -- and with respect to the supervisory liability over
8 Wallich and Colbert, they were responsible and had a duty under
9 the Board regulations to, quote, supervise the students at all
10 times and places. There had even been a memorandum which came
11 out in July 2018 reminding all coaches and personnel that the
12 coaches must directly supervise them at all times and all
13 places.

14 She knew that wasn't happening because she got repeated
15 complaints from her staff members that they weren't being
16 supervised, but notwithstanding that, she decided not to take
17 the action recommended by her staff and not to do anything
18 about the fact that she knew that Wallich and Colbert, under
19 her supervision and duty, were allowing the students to violate
20 the Montgomery County regulation, to be unsupervised, to run
21 wild in the building, in the locker room, and, yet, she did
22 nothing either to change that herself or to direct those who
23 were directly responsible for taking action here.

24 So for all those reasons, Your Honor, she is liable under
25 1983 for both theories.

1 THE COURT: All right. A couple minutes rebuttal,
2 Ms. Kane.

3 MS. KANE: The Fourth Circuit has never upheld a case
4 on state-created danger, Your Honor. And with respect to the
5 state-created danger, *Burns-Fisher* recently -- and I think
6 that's a district -- no, that one is a Fourth Circuit case, I
7 think that's where it said it, just a recent case that said, In
8 analyzing the state-created danger, it reversed the district
9 court's allowance, and said that -- held that the principal's
10 knowledge of a student's prior violent history, coupled with
11 the principal's failure to prevent the student from attacking
12 the teacher, did not constitute the reckless and affirmative
13 acts needed to plead a viable claim that the principal created
14 the risk that caused injury to the plaintiff under the
15 state-created danger theory.

16 Here, Mr. Maloney references a study hall. There was a
17 study hall intermittently in place under Jennifer Webster prior
18 to Ms. Crouse. When she came in, she did not renew the study
19 hall. That's an omission, not an affirmative act.

20 With respect to J.C.A., he talked --

21 THE COURT: You know, you are really philosophically
22 splitting hairs on this one, they talk about an omission versus
23 an affirmative act. There is a program in place, it stops
24 being in place, and you are calling that an omission. I mean,
25 is it an affirmative act? There are documents sent in about

1 J.C.S. [sic] delineating his history. She doesn't read them.

2 Is that an omission or is that an affirmative act?

3 I mean, really, an omission is, well, you may hear
4 something and you don't do anything about it at all, but here,
5 where you sort of got a policy in place or you have got a
6 warning in place and you do nothing, is that an omission? Is
7 that not arguably an affirmative act? That's where we are
8 getting into sort of -- we are stuck with a tyranny of words
9 here.

10 I mean, clearly, it's a different situation from simply
11 being told, Hey, by the way, there is harassment going on. You
12 say, Oh, okay, and don't do anything about it. That's a
13 different case. My recollection is the *Baynard* case is a
14 little more like that, where somebody is told -- I may have the
15 name wrong -- some sort of harassment is going on, and nothing
16 is done about it. The college president or whomever -- am I
17 wrong on this one? I may have the wrong case in mind.

18 Anyway, that's what I am saying here. When you talk
19 about no affirmative act, what do you do with that? I mean,
20 clearly, there is an --

21 MS. KANE: She's not increasing the danger with
22 respect to --

23 THE COURT: Well, that's the issue. Is she? By not
24 reading the report on J.C.S. [sic], is she not arguably
25 increasing the risk? She's warned, Look, this guy is troubled,

1 do something.

2 MS. KANE: It was delegated to Ms. Tallapragada, who,
3 in turn, took appropriate -- or took interventions with --

4 THE COURT: Is she not where the buck stops, though?
5 She's the principal. I don't know who she delegates it to, but
6 --

7 MS. KANE: Yes. But this is did she make an
8 affirmative act to increase the danger? Not that there is
9 already a known danger that exists, but that she created one or
10 made one that already existed a whole lot worse, and we don't
11 have that here.

12 THE COURT: Well, arguably, you may. I mean, that's
13 where we are now. Not that it -- you know, you are asking me
14 to stop the -- stop the suit right now with regard to that
15 theory because you say she didn't do anything that can be
16 characterized as an affirmative act. It's an action that's
17 taken where she is not reading the report that's warning her.
18 You say that's not an affirmative action.

19 MS. KANE: That's an omission. If anything, Your
20 Honor, it's an omission. And the study hall was not mandatory
21 before she came in. It was there intermittently. These were
22 omissions. If you -- applying the case law of the other cases
23 when -- and especially the *Burns-Fisher* that just came out,
24 these are omissions, and for an affirmative -- for the
25 state-created danger, she's got to create.

1 So she also gets qualified immunity. We have had no case
2 in the Fourth Circuit that's upheld that -- where -- where this
3 has happened to someone, so she should get qualified immunity
4 because it was not clearly established that her failure to act
5 or actions that did not directly create or increase the risk of
6 danger to the plaintiffs could satisfy the state-created danger
7 theory.

8 THE COURT: Okay. Understood. I know that's your
9 argument. Anything further?

10 MS. KANE: And for those reasons, we would -- the
11 Court's indulgence and make sure I didn't miss something.

12 THE COURT: Well, let's go on to Mr. Wallich and
13 finish up, Ms. Kane.

14 MS. KANE: With respect to Mr. Wallich, again, the
15 supervisory liability framework would apply, and Colbert --

16 THE COURT: I understand that Doe 1 is in on this
17 claim. Right?

18 MR. RUFF: That's correct, Your Honor.

19 THE COURT: Not in on the prior claim. All right.

20 MS. KANE: So, starting with Doe 1, with respect to
21 his supervision, alleged supervision of Colbert or any JV coach
22 prior to Doe 1's assault, there is no evidence that there was
23 wide and pervasive, unreasonable -- I mean that there was --
24 that one of his subordinates engaged in pervasive and
25 unreasonable conduct that created a risk of constitutional

1 injury to the plaintiff.

2 Going back in time to August 1, 2017, nobody had any
3 reports, notice, observations of sexual assault, sexual
4 harassment, assaults in the locker room. So if that's not
5 happening or not known to Colbert, then it can't be known to
6 his supervisor, Wallich, and Wallich can't be held responsible
7 on a supervisory liability theory which requires notice that
8 there is an ongoing problem and deliberate indifference to that
9 knowledge. It doesn't exist here. So with respect to Doe 1,
10 clearly, supervisory liability, summary judgment for the Board
11 should be granted.

12 And to the extent the Court -- he also has qualified
13 immunity because it was not clearly established in August of
14 2017 that state actors could be liable under the supervisory
15 liability theory when --

16 THE COURT: As to this count, it's only supervisory
17 liability that's being disputed? No state-created danger
18 theory?

19 MS. KANE: No. It's just supervisory liability.

20 THE COURT: Just trying to keep track of who is
21 arguing what.

22 MS. KANE: I get it.

23 It was not clearly established that the right to bodily
24 integrity or personal security required state actor supervisors
25 to ensure that their subordinates detected and prevented

1 student-on-student sexual harassment --

2 THE COURT: All right. No. That -- you have said
3 that as to each of the others, and I understand that argument.

4 MS. KANE: Yes. And then the same argument would
5 apply to Does 2 to 4 on supervisory liability. Again, there
6 was no notice to Wallich that there was unconstitutional, wide
7 and pervasive misconduct of Colbert's teammates -- student
8 football players and a response with deliberate indifference.

9 So what was reported, according to the record, when
10 Baggett-Stone and others made complaints that there -- they
11 were not about sexual harassment. They were about loud and
12 disruptive football players in the hallway. Baggett-Stone's
13 office was at the opposite side of the building from the locker
14 room, and there is not evidence here with respect to Does 2, 3,
15 and 4 that qualified immunity would still apply because --

16 THE COURT: I understand the argument on qualified
17 immunity. It's same across the board?

18 MS. KANE: Yes.

19 THE COURT: No need to repeat it.

20 MS. KANE: Thank you, Your Honor.

21 THE COURT: All right. Let me hear from Mr. Maloney.

22 MR. MALONEY: Your Honor, our claim, as the Court has
23 just heard, is for supervisory liability only for Mr. Wallich.
24 Mr. Wallich was actually reprimanded by the Board for his
25 failure to exercise appropriate supervision here. In its

1 Letter of recommendation -- of reprimand, it said, While you
2 delegated responsibilities to Mr. Colbert, the head JV coach,
3 you had responsibility here to ensure the effective,
4 appropriate supervision of JV football players in the locker
5 room. You did not have --

6 THE COURT: When this did letter come out?

7 MR. MALONEY: This came out after the investigation
8 into this incident. As a result of this incident, the Board
9 conducted its own investigation, and as a result of that
10 investigation, there was a formal reprimand that was placed in
11 his file for, quote, failing to exercise appropriate oversight
12 and supervision in your responsibilities as head varsity coach.

13 THE COURT: Does that come into evidence?

14 MR. MALONEY: That's in evidence and is --

15 THE COURT: Not what you put before me now. Does
16 that come into evidence at the trial?

17 MR. MALONEY: Oh, I think so. It's the Board's
18 formal position on his breach of supervisory liability. They
19 can't come into the court and say he didn't do anything wrong
20 as a supervisor when they had reprimanded him for a gross
21 breach of supervisory liability.

22 THE COURT: All right.

23 MR. MALONEY: And with respect to the actual
24 breaches, they said, You had failed to effectively ensure
25 supervision of JV football players in the locker room. You had

1 no football player required guidelines for monitoring. The
2 records show that Mr. Colbert, under your supervision, did not
3 take mandatory training for coaches, training relating to
4 hazing and harassment, child abuse, and other compliance
5 training.

6 And then it went on to say, Your failure -- As head
7 coach, it's incumbent upon you to ensure all these protocols
8 are complied with, and your failure to exercise adequate
9 oversight over JV coaches and programs to ensure Montgomery
10 County Public Schools regulations, safety, and expectations
11 were implemented violates our Code of Conduct. As a result,
12 you are reprimanded, and I warn you that any further incident
13 of this nature will result in more severe disciplinary action,
14 up to and including dismissal.

15 In addition to all of this, he was aware, in 2017, of the
16 report on November 17th, 2017 by the parent directly to
17 Ms. Crouse about the anal rape of the freshman in the locker
18 room. At that time, both Principal Crouse and Mr. Scriven, the
19 central office worker, testified in their depositions, one at
20 page 16-17, Crouse at 227, that Wallich was fully aware of the
21 sodomization allegations made by Mrs. H in 2017. Although he
22 was aware of those allegations in 2017, he did nothing to
23 ensure the supervision of the locker room at that time.

24 To the contrary, it was Mr. Wallich who -- who avidly
25 opposed putting the -- having the JV students supervised by

1 going to study hall knowing that there were repeated complaints
2 about the student -- the JV students' behavior unsupervised in
3 the locker room and elsewhere from 2:30 to 3:00.

4 So both of that knowledge, the knowledge of the
5 sodomization complaint, as well as the others -- and there has
6 to be an ostrich aspect to this, too, because when we have
7 seven or eight other JV students saying there was brooming in
8 the locker room and he claimed he knew nothing about it, but it
9 was his direct opposition that led Ms. Crouse not to impose
10 some form of adult supervision during the hours of 2:30 to 3:30
11 even though he was expressly responsible for making sure that
12 both the student athletes were supervised and the locker rooms
13 were supervised because there are Montgomery County regulations
14 directly on point on both of theirs.

15 Finally, with respect to him, he is individually
16 responsible for Mr. Abedi's conduct because he was the one who
17 was, the testimony was, actively involved in complaints around
18 Mr. Abedi. On October 11 --

19 THE COURT: J.C.?

20 MR. MALONEY: J.C., excuse me.

21 On October 11th, 2018, he reported in an email, J.C. is
22 not doing well with his transfer to DAX, and that there is a --
23 he gets an email or phone call almost daily about his bullying
24 behavior in class, et cetera. That's Exhibit No. 64.

25 He had the ability -- he threatened and he acknowledged

1 that he had the ability to suspend J.C. from the team, which
2 would have kept him out of the locker room, presumably, but he
3 chose not to exercise that authority and that responsibility
4 for reasons that related to his desire for the success of the
5 Damascus football team and not for the safety of the student
6 athletes.

7 THE COURT: Let's wind up. Thank you.

8 Mr. Ruff.

9 MR. RUFF: Your Honor, I would adopt much of
10 Mr. Maloney's arguments. And I would also just add that, you
11 know, there is case law that we cited, the *Hills vs. Bridgeview*
12 case, that cites that head coaches have a duty to supervise
13 subordinate coaches. So, he certainly was a supervisor. He
14 certainly -- there is an inference even as to John Doe 1,
15 although he's first in time. Based on the -- the breadth of
16 evidence that Mr. Maloney just talked about, the young men who
17 were assaulted, the -- the large amount of evidence that the
18 supervision just was not present, as well as the letter which
19 does not have any time frame on it which talks about his lack
20 of supervision, his lack of management, and his lack of
21 oversight over the JV football program, and so we would ask to
22 -- for the Court to also deny summary judgment for this count
23 as well.

24 THE COURT: As to -- as to supervisory liability
25 only?

1 MR. RUFF: As to supervisory.

2 THE COURT: Rebuttal, Ms. Kane?

3 MS. KANE: Briefly, Your Honor.

4 Maybe I wrote down the wrong number, but I looked up the
5 exhibit I thought Mr. Maloney cited, and I don't find what he
6 said there. I looked at Exhibit 64. I don't know if he gave a
7 different number. But -- not Mr. Ruff, Mr. Maloney. I didn't
8 find that evidence in the record, and it's my understanding --

9 THE COURT: Evidence, I'm sorry, of what? You didn't
10 find the evidence of what?

11 MS. KANE: A couple of things he said.

12 MR. MALONEY: This was the email that Mr. Wallich
13 sent saying I get complaints every day. I don't think the
14 Board disputes that he sent that email.

15 THE COURT: Is that the one you are referring to,
16 that email where he --

17 MS. KANE: He lumped a bunch of things together, Your
18 Honor, so I looked to see where the cite was -- where --
19 because it was facts I didn't remember from the record. I do
20 remember an email where he did say he got --

21 THE COURT: It's a problem every day or something
22 like that?

23 MS. KANE: Well, I am not sure it said what
24 Mr. Maloney said, but I was trying to -- I didn't want to
25 misstate the record, so I was looking for the exhibit.

1 THE COURT: Okay.

2 MR. MALONEY: The exact quote was specifically --
3 this was on October 11, 2018 -- JC is not doing well with his
4 transfer to --

5 THE COURT: A little louder and a little slower.

6 MR. MALONEY: J.C. is not doing well with his
7 transfer to DHS, and that he gets an email or phone call almost
8 daily about his behavior in class, bullying, et cetera. I
9 don't think anybody is disputing he sent that email.

10 THE COURT: No. I think she just --

11 MS. KANE: The content. He was talking about in
12 class, and I don't think that's --

13 MR. MALONEY: That's what he said in the email.

14 MS. KANE: I don't think that's what -- that's not
15 what I heard Mr. Maloney --

16 THE COURT: Well, I understand that there was some
17 statement by him to that effect, that J.C.A. was a problem with
18 bullying and other things.

19 MS. KANE: There were some problems with the -- you
20 know, in the -- in the classroom.

21 With respect to the reprimand and the Court's question
22 also to Mr. Maloney, the reprimand of Mr. Wallich, it's
23 evidence of -- and negligence, not evidence of deliberate
24 indifference, what he read to the Court.

25 THE COURT: I am not sure what -- again, I don't have

1 the --

2 MS. KANE: And I agree with the Court, it may not be
3 admissible, but --

4 THE COURT: I am not saying it's not admissible. It
5 may well be admissible, number one. It may well be relevant
6 beyond the cause of action for negligence. And it certainly
7 establishes the fact that he was considered a supervisor with
8 supervisory responsibility. That's what the Board says. You
9 are not going to get up in trial and say that he wasn't.

10 MS. KANE: That's subject to interpretation also,
11 Your Honor.

12 THE COURT: That's why, in a motion for summary
13 judgment, it may not pass muster because it's subject to, at
14 best, interpretation.

15 MS. KANE: Well, I am trying to give leeway to not
16 create issues of fact here. But what I am trying to say is
17 even given what he has represented to the Court, it's not
18 evidence of deliberate indifference. So we have an alleged
19 supervisor, an alleged subordinate, and what was that
20 subordinate doing that posed a risk of -- wide and pervasive
21 and unconstitutional risk of bodily harm to the plaintiffs?

22 THE COURT: All right.

23 MS. KANE: And yes, there were some issues with
24 J.C.A., but Wallich did not know the past history of J.C.A. He
25 knew he was disruptive in the classroom. He knew he made noise

1 in the hallway. He did not know about the prior sexual
2 harassment of the female at the middle school.

3 THE COURT: Is that what he said or is that what you
4 are saying?

5 MS. KANE: That's what the record shows. So with
6 respect to, you know, the claim against Mr. Wallich, Your
7 Honor, we would stand by he is entitled to qualified immunity
8 because he did not have -- it was not clearly established at
9 the time of this incident --

10 THE COURT: I understand your argument on that point.
11 All right.

12 MS. KANE: All right. Thank you.

13 THE COURT: All right, folks. Here is what. I had
14 hoped to give you an oral opinion at the end of this argument,
15 but I am not able to do so because, among other things, the
16 hour is late.

17 What I propose to do is, next Wednesday afternoon at
18 2:00, to render an oral opinion from the bench, so you are all
19 invited back next Wednesday at two. Make arrangements with
20 your other judges to be here. But that's what works for me,
21 and I have simply got to do that that way. So Wednesday
22 afternoon at two, I will give you a lengthy oral opinion. It
23 may take an hour or more to give to try and address the various
24 arguments.

25 Thank you very much for your presentations.

1 (The proceedings were concluded at 5:07 p.m.)

C E R T I F I C A T E

4 I, Renee A. Ewing, an Official Court Reporter
5 for the United States District Court for the District of
6 Maryland, do hereby certify that the foregoing is a true and
7 correct transcript of the stenographically reported proceedings
8 taken on the date and time previously stated in the above
9 matter; that the testimony of witnesses and statements of the
0 parties were correctly recorded in machine shorthand by me and
1 thereafter transcribed under my supervision with computer-aided
2 transcription to the best of my ability; and that I am neither
3 of counsel nor kin to any party in said action, nor interested
4 in the outcome thereof.

Renee A Ewing

Renee A. Ewing, RPR, RMR, CRR
Official Court Reporter
May 5, 2023

25

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